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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN P. HAMMER,
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF EUGENE,
a political subdivision of the State of Oregon,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does *Dolan v. City of Tigard*, 512 U.S. 374 (1987), create a prophylactic rule that requires governmental entities to make findings of "rough proportionality" at the time that they impose property exactions as a condition to development?

RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the Oregon Court of Appeals and the Oregon Supreme Court:

1. JOHN P. HAMMER, plaintiff-respondent, petitioner on review.
2. CITY OF EUGENE, defendant-appellant, respondent on review.

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PETITION FOR A WRIT OF CERTIORARI

John P. Hammer ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case. Petitioner previously sought discretionary review of the Oregon Court of Appeals' decision from the Oregon Supreme Court. The Oregon Supreme Court denied the petition for discretionary review without issuing an opinion on the merits.

OPINIONS BELOW

The opinion of the trial court is unreported (App., *infra*, 1a-5a). The opinion of the Oregon Court of Appeals (App., *infra*, 6a-16a) is reported at *Hammer v. City of Eugene*, 202 Or. App. 189, 121 P.3d 693 (2005). Hammer petitioned for

review of this decision by the Oregon Supreme Court, the state court of last resort in the State of Oregon. The Oregon Supreme Court's denial of the Petition for Review filed by Petitioner (App., *infra*, 17a) is reported at 340 Or. 308, 132 P.3d 28 (2006).

JURISDICTION

The opinion of the Oregon Court of Appeals was entered on October 12, 2005. The Oregon Supreme Court denied a timely Petition for Review on March 21, 2006. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*"

(Emphasis added.)

STATEMENT OF THE CASE

This case involves the Oregon Court of Appeals' reversal of the trial court's summary judgment holding that *Dolan* requires a governmental entity to justify the exaction of a property interest as a condition for development by making findings of rough proportionality at the time the exaction is

imposed and not years later after the property has already been taken and only because an inverse condemnation lawsuit has been filed. The case squarely raises the question whether *Dolan* imposes a prophylactic rule requiring the government to make an affirmative showing of "rough proportionality" before it may demand a property exaction as a condition for property development.

The Oregon Court of Appeals' decision holds that a governmental entity may require a property exaction from a property owner as a condition for development approval without making any "individualized determination" that the exaction is "related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Under the Oregon court's decision, the government may impose highly onerous property exactions upon an applicant as a condition for development and take the applicant's property while completely ignoring *Dolan's* requirements. The decision further authorizes the government to attempt to cure that constitutional defect by performing a belated and after-the-fact "rough proportionality" analysis in the unlikely event that the property owner sues for just compensation under the Taking Clause of the Fifth Amendment. (App., *infra*, 15a.)

The Oregon court's holding was predicated upon its view that *Dolan* did not prescribe a prophylactic rule "meant to prevent the government from exacting property without justification." (App., *infra*, 11a.) If that view is followed by other courts, this Court's holding in *Dolan* is eviscerated. This Court should accept review to make clear that the governmental findings required in *Dolan* were, in fact, intended to prevent the unconstitutional taking of property without just compensation and, consistent with that purpose, cannot be performed long after the property is taken and only in the event that an inverse condemnation suit is filed.

A. Factual Background

The facts of the case are simple and uncontested. In 1996, petitioner filed a request for a minor partition of his property. (Ex. A to Affidavit of Kathryn Powell Dempsey in Support of Plaintiff's Motion for Partial Summary Judgment ("Dempsey Aff.").) A minor partition simply divides property that is under single ownership into two or three parcels. *See* City of Eugene Code § 9.050. A minor partition divides property on paper and does not create any new roads or streets. Minor partitions do not give the landowner the right to build on or further develop the property without additional permission from the relevant governmental entity. (Affidavit of Thomas Poage in Support of Plaintiffs' Cross-Motion for Class Certification.) Its effect on the infrastructure of a city is virtually nonexistent. *See Schultz v. City of Grants Pass*, 131 Or. App. 220, 228-29, 884 P.2d 569 (1994) (acknowledging that impact from minor partition is "very limited" because it is simply an application to divide a lot and is not an application for construction).

Despite the lack of any likely impact on the City's infrastructure, the City tentatively approved petitioner's minor partition request on the condition that he dedicate several pieces of property to the City, including one at the southeast corner of his property and a 15-foot square public utility easement for a future unspecified electrical facility. (Ex. B to Dempsey Aff.) Before the tentative approval became final, the City further required petitioner to provide an additional 2.2-foot strip right-of way. (Affidavit of Douglas P. Schwinn, ¶ 4.) It is undisputed that the City did not engage in any effort to make *Dolan* findings linking the property that it required Petitioner to transfer to the City as a condition for approval of the minor partition with any impacts from the partition on the City. (Ex. L to Dempsey Aff.)

This class action case does not involve an isolated instance where the City dispensed with making "rough proportion-

ality" findings by mistake or oversight. Rather, the City's actions in Petitioner's case reflect an intentional governmental policy of simply ignoring the requirements of *Dolan* unless and until a property owner challenges the exaction. The City's treatment of Petitioner mirrors its treatment of all other minor partition applicants. In the 173 or so minor partitions which the City granted between June 24, 1994, and July 28, 1998, for which property dedications were required as conditions for approval, the City *never* made any findings of fact regarding "rough proportionality" as required by *Dolan. (Id.)*

The City admits that its undisputed practices for handling minor partition applications include no consideration of "rough proportionality" in imposing property exactions as conditions for applicants. (*Id.*) The City's practice is to assign a "planner-in-charge" to the minor partition application file. (Ex. F to Dempsey Aff.) The planner routes "referrals" to various city and extra-city entities for comments. (*Id.*) The referral comments often required property dedications which the planner then includes in the City's tentative approval of the application without *any* attempt to determine whether the dedications are "roughly proportional" to the projected impacts of the requested partition. (Exs. G, H, I to Dempsey Aff.) The City's policy reflects its view that few landowners will contest exactions required for minor partitions because the time and cost involved often outweighs the value of the land at issue, with a high-ranking City official explaining that "time is generally the most pressing issue for developers and they'll accede to reasonable exactions." (Ex. 8 to Affidavit of Kathryn Powell Dempsey in Support of Plaintiffs' Motion for Class Certification ("Dempsey Aff. for Class Cert.") The City's attitude is best expressed by its employee Charles Nordgaard, who candidly acknowledged: "If challenged, my guess is that we will lose, but if you feel confident they will not challenge, why not require it?" (Ex. 4 to Dempsey Aff. for Class Cert.)

B. The Trial Court's Decision

Petitioner brought this action against the City in June 2000. The parties filed competing motions for summary judgment. Among other things, Petitioner's summary judgment motion sought a determination that the City was precluded from attempting to establish at trial that its exaction of his property was "roughly proportional" to the impact from his minor partition because it was undisputed that the City had failed to make any such findings at the time of the property exaction. (App., *infra*, 25a-28a.) On August 15, 2003, the trial court issued its order finding that the City had not made *Dolan* findings or engaged in a "rough proportionality" analysis when it required a property dedication as a condition of granting Petitioner's application for a minor partition. (App., *infra*, 5a.) The trial court held that that the City was required to make "rough proportionality" findings before it imposed any property exaction and, therefore, granted plaintiff's motion for partial summary judgment. (*Id.*)

The City moved for an interlocutory appeal under ORS 19.225, an Oregon statute that allows interlocutory appeals in class action cases where there is a controlling question of law for which there is a substantial ground for difference of opinion. (App., *infra*, 2a.) The trial court found that there was a controlling question of law,

> "namely whether a city, which is sued for damages for having made an unconstitutional exaction may attempt to prove in the case that the exaction was 'roughly proportional' to the impact of the proposed development within the meaning of *Dolan v. City of Tigard* and its progeny, notwithstanding the city's failure to have prepared written '*Dolan* findings' at the time the exaction was made."

(App., *infra*, 2a.)

The trial court further found, based on the "absence of controlling authority," that a substantial ground for a difference of opinion existed on this issue, and it certified the issue for interlocutory appeal. (*Id.*)

C. The Appellate Court Decisions

The Court of Appeals accepted the certification and reversed the trial court's grant of partial summary judgment in favor of Petitioner. (App., *infra*, 7a.) The Oregon Supreme Court subsequently denied Petitioner's request for review of the Court of Appeals' decision without comment. (App., *infra*, 17a.)

The question of whether *Dolan* prescribes a prophylactic rule intended to prevent unconstitutional takings by requiring "rough proportionality" findings to be made at the time of the exaction was squarely presented to, and was the only issue before, the Oregon Court of Appeals. The Oregon Court of Appeals reversed the trial court's order and held that *Dolan* does not establish a prophylactic rule as a means to prevent unconstitutional takings. (App., *infra*, 16a.) The Oregon Court of Appeals interpreted *Dolan* to allow governmental entities to ignore, with impunity, the constitutional requirement of "rough proportionality" between property exactions and the impacts of the proposed development until long after the physical taking of an applicant's property is complete. (App., *infra*, 15a.) That holding drains *Dolan* of any substance and renders its constitutional protections meaningless.

REASONS FOR GRANTING THE WRIT

I. THIS CASE POSES AN IMPORTANT ISSUE OF FEDERAL CONSTITIONAL LAW

The issue in this case is whether the affirmative duty imposed upon government by *Dolan*, to prove "rough proportionality" when property owners are compelled to give up

property interests as a condition of development approval, may be disregarded at the time of the exaction and, instead, only considered after the property is taken in the event that the property owner challenges the compelled exaction. That question involves an important issue of federal constitutional law which was decided by a state court and which has not been, but should be, definitively settled by this Court. Sup. Ct. R. 10(c).

In reversing the trial court's ruling that *Dolan* findings must be made at the time of the exaction, the Oregon Court of Appeals' decision misapprehended the rule of law established by this Court in *Dolan*. The Oregon Court of Appeals failed to appreciate the doctrine of unconstitutional conditions upon which *Dolan* is based and gave short shrift to the rights of property owners who are compelled by governmental entities to give up valuable property rights without just compensation. The Oregon court's decision illustrates the need for this Court to further clarify the application of its decision in *Dolan* and, specifically, whether that decision articulates a prophylactic rule intended to prevent violations of the Takings Clause of the Fifth Amendment.

Although the application of the doctrine of unconstitutional conditions in the context of the Takings Clause of the Fifth Amendment is of fairly recent vintage, the doctrine itself is one that has a long and important history in the constitutional jurisprudence of this Court. *See, e.g.*, Lynn A. Baker, *The Prices of Rights: Towards a Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185 (1990) (discussing doctrine). The doctrine of unconstitutional conditions is simply the rule that the government may not "deny a benefit to a person on a basis that infringes his (or her) constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This Court has explained the rationale underlying the doctrine by stating:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees imbedded in the Constitution of the United States may thus be manipulated out of existence."

Frost & Frost Trucking Co. v. Railroad Com. of California, 271 U.S. 583, 593-94 (1926).

The Supreme Court first applied the doctrine of unconstitutional conditions to governmental actions implicating the Takings Clause in *Nollan v. California Coastal Com.*, 483 U.S. 825, 827 (1987). In *Nollan*, the local government granted the property owners a building permit on the condition that the property owners convey a public easement along a portion of their beachfront property. *Id.* at 828. In evaluating whether requiring the easement was an unconstitutional condition under the Takings Clause, the Court started with the premise that the government's action undoubtedly would have been a taking if it had not been imposed as a condition for the building permit. *Id.* at 831.

From that premise, the Court then examined whether, in the context of a building permit, the condition was a legitimate exercise of the government's police power to regulate

land use or, instead, was an unlawful taking. *Id.* at 836-37. In deciding that issue, the Court explained that the constitutional propriety of the condition turned on whether the condition had an "essential nexus" to the concession of property rights. *Id.* In the absence of this "essential nexus," the Court held that the required condition is "not a valid regulation of land use but an out-and-out plan of extortion." *Id.* at 837 (internal quotation marks and citations omitted). Because the Court determined that the compelled easement lacked an essential nexus to the burden created by the proposed new building, the Court held that the governmental body could not lawfully impose the condition without providing just compensation.

The Supreme Court next applied the doctrine of unconstitutional conditions to governmental action implicating the Takings Clause in *Dolan.* The Court in *Dolan* refined the "essential nexus" test of *Nollan* by adding the requirement that governmental bodies may not condition approval of property development requests on uncompensated property conveyances unless they make findings establishing that the required dedications are "roughly proportional" to the impacts of the proposed development. *Dolan*, 512 U.S. at 391. The Court held that the governmental body "must make some sort of individualization determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* Although the Court in *Dolan* did not require a precise mathematical calculation, it held that "the city must make *some effort* to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 395-96 (emphasis added). Imposing that requirement, the Court held that the government has an *affirmative* burden to make such findings "in support of the dedication." *Id.* at 395-96.

In *Dolan*, this Court held that a governmental entity which does not satisfy its burden of showing "rough proportionality"

imposes an unconstitutional condition under the Takings Clause because, in the absence of a legitimate regulatory purpose, the condition impermissibly demands that the applicant convey property to the government without just compensation. *Dolan*, 512 U.S. at 392-96. In comparing that type of unconstitutional condition with conditions violating other provisions of the Bill of Rights, the Court stated that it "saw no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Id.* at 392.

Unlike this case, in both *Nollan* and *Dolan*, the Supreme Court was not faced with a governmental entity which imposed dedication requirements without making *any* findings justifying the requirement at or about the time of the action. Therefore, the Court did not have occasion to decide the precise issue presented in this case. Academic commentators, however, have recognized that the *Nollan/Dolan* decisions aim to "serve as doctrinal shields that would protect property owners and the integrity of property rights against the effects of local government's unchecked administration of their police powers." Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Calif. L. Rev. 609, 632 (May 2004). As one commentator explains:

> "(T)he Court's statement that 'the lack of nexus between the condition and the original purpose of the building restrictions converts that purpose to something other than what it was' must be understood as in the nature of a prophylactic rule, not a true finding of fact. Put another way, *Nollan* may reflect a judgment that so many non-germane conditions on land use regulations reflect impermissible governmental purposes so as to make it appropriate to set forth a categorical rule in this narrow arena even though particularized *ex post* deter-

> minations are more suitable for other types of unconstitutional conditions."

Mitchell and Berman, *Cohesion without Baselines: Unconstitutional Conditions in Three Dimensions,* 90 Geo. L. Rev. 1, 93-94 (Nov. 2001).

The view of academians that the *Nollan/Dolan* rule is a prophylactic one designed to avoid constitutional violations correctly follows from this Court's teachings in *Dolan.* The clear import of *Dolan* is that a governmental body may impose exactions as a condition of development approval only if it can demonstrate *at the time* of its demand that there is a "roughly proportional" relationship between the property exaction and the impact of the proposed development. If the government cannot demonstrate rough proportionality at the time of its demand, the Takings Clause requires that it pay for the exaction and implement its policies by way of condemnation.

Any contrary reading of *Dolan* renders much of the Supreme Court's opinion a nullity. Specifically, the Court's statements in *Dolan* that the government has the burden to (1) make an individualized determination of the effects of the *proposed* development, and (2) make some effort to quantify its findings *in support of the dedication* makes no sense if construed to mean that the burden does not exist until *after* the exaction has already been imposed and the taking is complete by the transfer of title. *See Dolan*, 512 U.S. at 391, 395-96. The focus of the Court in *Dolan* was on the demand made by the government at the time of the request for development approval and on the government's justification for demanding the exaction at that time. In focusing on those issues, the Court recognized that government power to condition approval of a development application upon a dedication of a portion of the applicant's property could, if imposed without any legitimate reason, "convert a valid regula-

tion of land use into 'an out and out plan of extortion.'" *Dolan*, 512 U.S. at 387 (quoting *Nollan*, 483 U.S. at 387).

To prevent such unconstitutional action, the Court created a prophylactic rule requiring that the governmental entity "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The use of the words "make," "required," and "proposed" in the above-quoted passage means that the governmental entity must affirmatively undergo a "rough proportionality" determination *prior* to imposing the condition and *prior* to allowing the development. The requirement of individualized findings to justify taking an applicant's property is an *affirmative* burden placed upon the government prior to compelling the property exaction. *Id.* at 391. The Court did not create a rule allowing the individualized determination to be delayed until long after title to the property was transferred to the government and after the proposed development was already completed.

Nothing in *Dolan* supports the notion that, as in this case, a governmental entity may refuse to assess the individualized impacts of a particular development application and still demand property dedication as a condition of approval. The Supreme Court's decision in *Dolan* was intended to prevent governments from imposing unconstitutional conditions on landowners in exchange for application approval. *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1157-58 (9th Cir. 1997) ("the heightened scrutiny applied in *Dolan* was employed to prevent the government from using its regulatory power to force individuals to bear burdens that properly should be borne by the public"). When the government, as in this case, compels the transfer of title to private property for the grant of a minor partition or other development approval without first establishing the "rough proportionality" required by *Dolan*, the government has effectuated a complete taking

of property and is left with only the obligation to pay the property owner just compensation. *See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 304 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner * * * ". (internal citation omitted)). Under *Dolan*, the government may not condition the grant of a benefit—here the minor partition approval—upon the relinquishment of valuable property rights without first making "rough proportionality" findings. Government is simply not privileged to demand and take title to the property unless it has first made findings of "rough proportionality" between the exaction and the proposed development.

In reaching a contrary conclusion, the Oregon Court of Appeals decision ignores the import of *Dolan* and the fact that this Court created a prophylactic rule intended to deter constitutional violations. Courts generally make prophylactic rules, such as in *Dolan*, where the absence of a clear rule creates a danger of impermissible official action. *See, e.g.*, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 196 (1998) (discussing prophylactic rules in the context of the First and Fifth Amendments to the United States Constitution). This is especially true in areas of constitutional law where there is a risk of undetected constitutional violations. *Id.* at 192-93. Prophylactic rules "are a central and necessary feature of constitutional law." *Id.* at 190. When courts impose such rules to prevent constitutional violations, "they consider not only the constitutional values at stake, but also the institutional difficulties that courts face in advancing those values." *Id.* at 192. Thus, in fashioning prophylactic rules, courts generally consider whether and to what extent the prophylactic rule will modify the behavior of government officials so as to reduce the number and extent of constitutional violations. *Id.* at 193. *Dolan*—properly inter-

preted to require "rough proportionality" findings at the time the property exaction is imposed—is an effective deterrent which, if followed, clearly reduces the number and extent of unconstitutional takings under the Fifth Amendment.

The Supreme Court has been especially vigilant in ensuring that prophylactic rules are not undermined by governmental action. For example, in *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court rejected the notion that law enforcement officers may withhold the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966), obtain confessions from suspects, then give the warnings and repeat the same questions which had elicited the previous confession in an effort to obtain the same answers. The Court explained that allowing such conduct would drain "the substance out of *Miranda*" and would effectively threaten "to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted." *Siebert*, 542 U.S. at 617.

The same is true in this case. To hold that a governmental entity may impose exactions on an applicant without making *any* attempt to justify the exaction by making findings of rough proportionality drains the substance out of *Dolan* and thwarts its purpose of reducing the risk that exactions will be imposed that are not related in nature and extent to the impact of the proposed development in violation of the Fifth Amendment. To allow the government to ignore *Dolan* findings until long after the property has been taken without just compensation permits and encourages the "out and out plan of extortion" that *Dolan* meant to avert. *Dolan*, 512 U.S. at 387.

The need for a prophylactic rule in the context of land-use exactions is compelling. The record in this case illustrates that point. Knowing that few landowners will contest exactions imposed for minor partition in view of the time and cost required to mount such a challenge, the City gambled that it could impose exactions without making any findings of rough proportionality and suffer no complaints. As a high-ranking

City official explained, "time is generally the most pressing issue for developers and they'll accede to reasonable exactions." (Ex. 8 to Dempsey Aff. for Class Cert.) Another city employee candidly acknowledged that the City felt confident imposing exactions for minor partitions without making any *Dolan* findings because those exactions were not likely to be challenged by applicants. (Ex. 4 to Dempsey Aff. for Class Cert.)

The Oregon Court of Appeals' decision encourages government to take property as a condition for development approval without ensuring any relationship between the imposed exaction and the impact of the development. Although it declined to hold that a governmental entity must make "rough proportionality" findings before imposing an exaction in the absence of a clear directive from this Court, the Texas Court of Appeals recognized the absurdity of allowing after-the-fact findings, stating "[w]e question how a municipality could determine that a development exaction would pass constitutional muster without first engaging in some sort of pre-exaction analysis." *Town of Flower Mound v. Stafford Estates L.P.*, 71 S.W.3d 18, 41 (Tex. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004).

In a recent opinion dissenting from a denial of a petition for writ of certiorari, three justices of this Court expressed concern that state and local governmental bodies are evading or ignoring the requirements of the *Dolan* decision. *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (questioning California "state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal. There is reason to believe that this may be more than a local and isolated phenomenon") (Scalia, J., dissenting, joined by Kennedy and Thomas, JJ.). The City of Eugene's intentional and cavalier policy of disregarding *Dolan* illustrates that the concerns of the dissenting justices expressed in *Lambert* are well-founded. This Court should accept review

to make it clear to government officials that *Dolan* does, in fact, establish a prophylactic rule which cannot be ignored until after property is taken without just compensation.

II. THIS CASE HAS RAMIFICATIONS FAR BEYOND THE STATE OF OREGON

If state and local governments throughout the United States are allowed to take property from individuals and businesses who seek development approval without making any effort to first determine rough proportionality, then the *Dolan* decision is watered down to the point where it is essentially meaningless. Governments may simply ignore the rough proportionality requirements of *Dolan* and leave the property owner with the choices of either transferring the property interest or withdrawing the application for development approval. In the unlikely event that the property owner elects to transfer the property interest in order to go forward with the development and then sues for just compensation, the Oregon Court of Appeals' decision allows the governmental entity to engage in after-the-fact justifications—distorted by the passage of time—to show that its exactions were permissible at the time that they were imposed.

The Court of Appeals' ruling will adversely affect thousands of property owners throughout the United States. In the City of Eugene, Oregon, alone, there were approximately 173 landowners who were compelled to convey interests in their property to the government as a condition of gaining approval for a minor petition between June 24, 1994, and July 28, 1998. (Ex. L to Dempsey Aff.) Since the City of Eugene's population is less than five percent of the State of Oregon's total population, extrapolating that figure statewide makes it likely that nearly 3,500 Oregonians were compelled to give up property to the government between 1994 and 1998 as a condition for gaining approval of a minor petition. *See Oregon Blue Book: Almanac & Fact Book, 2005-2006*, Bill

Bradbury, Oregon Secretary of State, 242-47 (2005). Since Oregon's population is less than 2% of the nations' population as a whole, it is readily apparent that many thousands of Americans are likely being affected by similar governmental action with regards to partitions of their property. *See* FedStats, Oregon, at http://www.fedstats.gov/qf/states141000.html (June 8, 2006).

The obvious impact of a decision by this Court on this issue is magnified even further when it is considered that the above-cited figures exclude compelled property exactions imposed by governmental bodies in connection with other type of development applications, such as requests for building and construction permits, requests for subdivision approval and the like. There is no question that local governments are compelling property exactions throughout the nation on a daily basis from individuals and businesses who merely want to partition or develop their property. Many governments, like the City of Eugene, simply ignore *Dolan's* requirements until long after the taking is complete and *only* if they are challenged. Similar governmental conduct is occurring not only in Oregon but throughout the country. *See, e.g., Town of Flower Mound v. Stafford Estates, L.P.*, 71 S.W.3d 18 (Tex. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004).

CONCLUSION

Governmental entities faced with applications for development approval, in whatever form they might take, are permitted under *Dolan* to require property dedication or other exactions only when they are able to sustain the burden of demonstrating that the exaction is "roughly proportional" to the impacts of the proposed development. However, they should not be permitted to avoid their affirmative duty to make such a showing and demand property dedication and other exactions without making *any effort* to analyze the impacts of a proposed development. The purpose of *Dolan*

was to prevent government from using land regulation as an "out and out plan of extortion." *See Dolan*, 512 U.S. at 387. This prophylactic purpose is seriously undermined if government can take what it wants as a condition for development approval without first demonstrating "rough proportionality" between its exaction and the impact of the proposed development. Because the Oregon Court of Appeals' decision creates an enormous potential for undetected and unremedied constitutional violations—particularly if followed by other courts across the nation—this Court should accept review to make it clear that *Dolan* sets forth a prophylactic rule, which must be complied with at the time that the governmental entity imposes its property exaction.

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

Case No. 16-00-12795

JOHN P. HAMMER, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CITY OF EUGENE, a political subdivision of the State of Oregon,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, CERTIFYING ISSUE FOR INTERLOCUTORY APPEAL, AND STAYING TRIAL COURT PROCEEDINGS

This matter previously came before the court on Defendant's Motion to Reconsider Order Denying Defendant's Motion for Summary Judgment and on Plaintiff's Cross-Motion for Reconsideration of the Court's Order Denying Plaintiff's Motion for Partial Summary Judgment. On August 15, 2003, the court issued an Order, in which it granted both parties' motions for reconsideration, denied the Defendant's Motion for Summary Judgment, and granted Plaintiff's Motion for Partial Summary Judgment, ruling that defendant was not entitled to prove in this case that the alleged exactions of property interests that are the subject of this lawsuit

were "roughly proportional" to the impacts of the proposed development within the meaning of *Dolan v. City of Tigard*, 512 US 374 (1994), and its progeny.

This matter subsequently came before the court on Defendant's Motion for Order Certifying Issues for Interlocutory Appeal and Request for Stay, in which defendant requested that the court certify the ruling made in its Order of August 15, 2003 for interlocutory appeal under ORS 19.225. The court, having heard the oral argument of the attorneys, and having reviewed the relevant motions and related documents, hereby orders as follows:

1. The court's Order of August 15, 2003, (a copy of which is attached hereto as Exhibit 1) is hereby incorporated by reference.

2. Defendant's Motion for Order Certifying Issues for Interlocutory Appeal and Request for Stay is granted.

3. Pursuant to ORS 19.225, the court finds as follows:

a. This Order involves a controlling question of law, namely whether a city, which is sued for damages for having made an unconstitutional exaction, may attempt to prove in the case that the exaction was "roughly proportional" to the impact of the proposed development within the meaning of *Dolan v. City of Tigard* and its progeny, notwithstanding the city's failure to have prepared written "*Dolan* findings" at the time the exaction was made.

b. As demonstrated by the motions and supporting documents filed by the parties, the arguments of counsel, and the absence of controlling authority, there is a substantial ground for difference of opinion on that question.

c. An immediate appeal with regard to this issue will materially advance the ultimate termination of this litiga-

tion by deciding this issue, which will affect both the procedure and evidence at trial and, possibly, the outcome of the case.

4. The court denies defendant's motion for an order certifying for interlocutory appeal the other issues concerning which defendant previously sought permission to pursue an interlocutory appeal, namely (a) whether this court erred in certifying this case as a class action, (b) whether the analysis in *Dolan v. City of Tigard*, applies to inverse condemnation claims brought under the Oregon Constitution, and (c) whether a city may impose exactions as a condition of approval of a minor partition.

5. All proceedings in the trial court in this case are stayed until the matter is remanded from the appellate courts.

Dated: September 8, 2003.

/s/ Lauren S. Holland
Lauren S. Holland
Circuit Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

[Filed Aug 15, 2003]

Case No: 16-00-12795

HAMMER, et al.,

Plaintiff.

vs.

CITY OF EUGENE,

Defendant.

ORDER

THIS MATTER came before the Court on the City of Eugene's Motion to Reconsider its Order Denying Defendant's Motion For Summary Judgment, filed May 23, 2003 and on Plaintiff Hammer's Cross Motion For Reconsideration of the Court's Order Denying Plaintiff's Motion For Partial Summary Judgment. The Court heard oral argument of attorneys, as well as reviewed the original Motions For Summary Judgment, Memoranda, Affidavits and supporting documents and based upon a review of the entire record and argument of counsel, the Court makes the following findings. Summary Judgment is appropriate if a party establishes that there is no genuine issue as to any material fact and that they are entitled to a Judgment as a matter of law. ORCP 47(C). There is no genuine issue of material fact if "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment" ORCP 47(C). The Court makes that determination, reviewing the record in a light most favorable to the non-moving party. In this case, the Plaintiff has filed a Motion For Partial Sum-

mary Judgment and Defendant filed a Motion For Summary Judgment. The Court finds that pursuant to the holding in *Dolan v. City of Tigard*, 512 US 374 (1994), the U.S. Supreme Court decided that the government may not compel property dedications as conditions to development approval unless it makes the findings showing that the required dedications are related both in nature and extent, that is, they are, roughly proportional to the impacts of the proposed development. *Dolan v. City of Tigard, supra*, at 391. In this case, the City of Eugene was required to comply with the requirements set forth in *Dolan*. The Plaintiff applied for a minor petition. As a condition of its final approval, the City of Eugene informed the Plaintiff that he must dedicate three portions of his property to the City. Plaintiff complied with City of Eugene's dedication requirements and the City thereafter approved his minor partition. The city admits that it did not make findings as required by the U.S Supreme Court nor did the Defendant perform a rough proportionality analysis in its approval of Plaintiff's minor petition. The Court finds as a matter of law that the City of Eugene is not entitled to make findings at the time of trial, subsequent to the exaction, therefore

IT IS HEREBY ORDERED that the Court allows the Motions to Reconsider its prior rulings set forth herein and grants Plaintiffs Motion For Partial Summary Judgment and denies Defendant's Motion For Summary Judgment,

Dated this 15 day of August, 2003.

/s/ Lauren S. Holland
Lauren S. Holland
Circuit Judge

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

16-00-12795; A122564

JOHN P. HAMMER, on behalf of himself and all others similarly situated,

Respondent,

v.

CITY OF EUGENE, a political subdivision of the State of Oregon,

Appellant.

Appeal from Circuit Court, Lane County
Lauren S. Holland, Judge.
Argued and submitted March 3, 2005

William F. Gary argued the cause for appellant. On the briefs were Jens Schmidt and Harrang Long Gary Rudnick, P.C.; on the reply brief was Karla Alderman.

Donald Joe Willis argued the cause for respondent. With him on the brief were Michael T. Garone, Jill S. Gelineau, and Schwabe, Williamson & Wyatt, P.C.

David J. Hunnicutt, Oregonians in Action, and Meriem L. Hubbard, Pacific Legal Foundation, filed the joint brief *amicus curiae* for Pacific Legal Foundation.

Before Haselton, Presiding Judge, and Linder* and Rosenblum,** Judges.

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* Linder, J., *vice* Richardson, S. J.

** Rosenblum, J., *vice* Ortega, J.

ROSENBLUM, J.

Order granting partial summary judgment for plaintiff reversed and remanded.

This is an interlocutory appeal in a class action against the City of Eugene (the city) for inverse condemnation. The city exacted real property interests from the class members as a condition to granting their applications to partition land.[1] Plaintiff, the class representative, argued before the trial court that the class members are entitled to just compensation under the Takings Clause of the Fifth Amendment to the United States Constitution because the city did not make findings showing that the exactions and the impact of the developments proposed in the applications were "roughly proportional" in accordance with the test set forth in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). The city conceded that it had not made the findings when it conditionally approved the applications, but it sought to demonstrate "rough proportionality" at trial. The trial court granted partial summary judgment for plaintiff on the issue of liability, ruling that the city was required to make the "*Dolan* findings" at the time that it made the exactions. On the city's motion, the court certified for immediate appeal the issue whether the city may prove rough proportionality at trial. *See* ORS 19.225. We answer the question in the affirmative, and we reverse.

The pertinent facts in this case are undisputed. Plaintiff owned a single 3.32 acre parcel of land in Eugene. In December 1996, he applied to the city to partition the land into three

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[1] The trial court certified the case as a class action, identifying the class as approximately 173 landowners who applied to the city for minor partitions of property on or after June 24, 1994, and whose partitions the city approved on the condition that they convey real property interests to the city. Eugene Code section 9.0500 defines "partition" as a division of one parcel into two or three parcels. A minor partition is one that does not involve the creation of a public street.

parcels. The city's planning director approved the application subject to certain conditions, three of which required plaintiff to convey to the city either title to or an easement on portions of the property. Plaintiff complied with the conditions without objection, and the city gave final approval of the partition in 1998. In June 2000, plaintiff brought this action, seeking just compensation in the amount of $2,401.35, the alleged fair market value of the property conveyed, plus interest from the date of the conveyance.

Before we recite the parties' arguments, a brief overview of the legal principles underlying this case is helpful. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." That guarantee was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 US 40, 49, 80 S Ct 1563, 4 L Ed 2d 1554 (1960). For example, if the government constructs a highway for use by the general public, it would be unfair to construct it on privately owned property without paying the owner just compensation for the affected property, because the benefit would inure to the general public, whereas the burden would rest solely on the landowner.

Conversely, when a landowner proposes to develop private property in a way that would create a burden on a public interest, the government generally may, by exercise of the police power, prohibit the development. *Nollan v. California Coastal Comm'n*, 483 US 825, 834-36, 107 S Ct. 3141, 97 L Ed 2d 677 (1987). Such a prohibition constitutes a valid "land-use regulation [that] does not effect a taking if it * * * does not 'den[y] an owner economically viable use of his land.'" *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980)). As an alternative to outright prohibition, the government may, in its discretion, protect the public interest at risk by conditioning

approval of the development on some concession by the landowner—such as a concession of property interests—that mitigates the public burden that would otherwise justify prohibiting the development. As the Supreme Court explained in *Nollan*,

> "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit [is not] a taking if the refusal to issue the permit would not constitute a taking. * * * If a prohibition designed to accomplish [a particular] purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not."

483 US at 836-37.

To determine whether an exaction exceeds the government's power to take private property for public benefit, courts must apply the two-pronged test that the Supreme Court developed in *Nollan* and *Dolan*. The first prong concerns simply whether the exaction and prohibition share a common purpose, or, in the Supreme Court's words, whether they have an "essential nexus." *Nollan*, 483 US at 837.

The second prong requires that the exaction and the projected impact off the proposed development be similar in magnitude. The Supreme Court explained the requirement in *Dolan*:

> "We think that a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

512 US at 391. In short, where a conveyance of property interests that is required by the government as a condition to approval of a development application—that is, an exaction—furthers the same end that would justify prohibiting the proposed development and is roughly proportional to its projected impact, the conveyance is not a taking and the landowner is not entitled to compensation.

Because *Dolan* is central to the parties' arguments, it is important to note ways in which it differs from the case before us. In *Dolan*, the planning commission for the City of Tigard approved the landowner's building permit subject to the condition that she convey portions of the affected property to the city, but, unlike here, it supported its decision with findings that it had made in advance concerning the relationship between the condition and the projected impacts of the landowner's proposed project. 512 US at 379-81. Thus, the timing of those findings was not before the Court in *Dolan*. Additionally, *Dolan* was not an inverse condemnation action, but an administrative land use proceeding. The landowner did not accept the conditions and later institute an action for just compensation, as plaintiff did here. Instead, she appealed the planning commission's decision administratively. She initially sought a variance from the conditions, which the planning commission denied. After the Tigard City Council approved the commission's final order, she appealed the decision to the Land Use Board of Appeals (LUBA). *Id.* at 382. There, she argued that the conditions were unconstitutional because they constituted an uncompensated taking under the Fifth Amendment. She requested that LUBA either "reverse the city's imposition of th[e] condition or remand the decision to the city with instructions to remove the condition." *Dolan v. City of Tigard*, 22 Or LUBA 617, 621 (1992). Thus, unlike here, in *Dolan*, no property interests had been conveyed.

With those differences in mind, we turn to the parties' arguments. The city contends that the trial court effectively

ruled that the absence of *findings* demonstrating rough proportionality at the time that property interests are conveyed in and of itself establishes an unconstitutional taking. According to the city, under *Dolan*, an unconstitutional taking occurs only in the absence of rough proportionality itself. The city argues that, when a property owner brings an action for inverse condemnation after the government has conditionally approved a development proposal, neither *Dolan* nor the Takings Clause precludes the government from demonstrating, after the fact, that rough proportionality existed at the time of the exaction. The city's position is that, when a claimant forgoes the administrative appeal process, the government should be able to present the same evidence of rough proportionality to the trial court in an inverse condemnation action that it would have been permitted to present to the hearings officer in an administrative appeal.

In his response, plaintiff agrees with the city's characterization of the effect of the trial court's ruling. Plaintiff asserts that the Supreme Court held in *Dolan* that the government has an affirmative burden to make findings of rough proportionality in support of an exaction *before* it takes title to the property. He contends that, when a governmental entity has not met that burden, it violates the Takings Clause because "it has taken the applicant's property without the payment of just compensation." Plaintiff thus argues that the Supreme Court intended for the rough proportionality rule to be prophylactic—in other words, that the rule is meant to prevent the government from exacting property without justification.[2] Plaintiff acknowledges that the precise issue involved in this case was not before the Court in *Dolan*. He

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[2] In portions of his argument, plaintiff appears to urge this court to adopt the prophylactic rule that he advances even if it is not required by *Dolan* or the Takings Clause. If that is indeed plaintiff's intent, we decline to do so. Whether such a rule is desirable is the sort of policy issue that is best addressed to the legislature.

contends, however, that a close reading of the Court's opinion reveals that it intended to create a prophylactic rule to be applied when property interests have in fact been conveyed. Plaintiff relies on statements in the Court's opinion such as, "The question for us is whether *these findings* are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit." *Dolan*, 512 US at 389 (plaintiff's emphasis).[3] Plaintiff argues, in essence, that the Supreme Court recognized in *Dolan* that the government has a constitutional duty to make rough Proportionality findings before it imposes an exaction.[4]

We disagree both with plaintiffs assertion that the Supreme Court created a prophylactic rule in *Dolan* and with the underlying premise that the Takings Clause requires such a rule. Plaintiffs argument that the Court affirmatively created the prophylactic rule that he urges us to apply here requires

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[3] Plaintiff also argues that the following passages in *Dolan*, among others, indicate that the Court intended to create a prophylactic rule: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 US at 391. "In this situation, the burden properly rests on the city." *Id.* at 391 n 8. "We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." *Id.* at 394-95. "[T]he city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." *Id.* at 395. "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication * * *." *Id.* at 395-96.

[4] Plaintiff also contends that, if we hold that the city may attempt to demonstrate rough proportionality at trial, just compensation is due for a temporary taking because the city has held title to his property since the partition was finalized. That issue is not properly before us in this interlocutory appeal, and we do not consider it. Plaintiff also raises other arguments that we reject on the merits without discussion.

little discussion. The Court's opinion in *Dolan* does not support plaintiff's assertion. The Court's references to "these findings"—that is, the findings made by the City of Tigard—and its holding that "the findings upon which the city relies [did] not show the required reasonable relationship," *id.* at 394-95, simply reflect the procedural posture of the case. Given that the City of Tigard had made findings and that the only issue before the Supreme Court was whether those findings were sufficient, it makes sense that the Court used the terms that it did. We cannot conclude that the Court intended to create a rule with such profound consequences merely by implication and in a case in which the rule had no application.

We also reject plaintiffs underlying premise that the Takings Clause itself compels the government to make rough proportionality findings at the time that it imposes an exaction on a development application. Plaintiff effectively reads a procedural requirement into the Takings Clause. That reading conflicts with the text and structure of the constitution and with other Supreme Court decisions.

Three clauses in the: constitution address private property rights: the Takings Clause, the Fifth Amendment's Due Proeess Clause, and the Fourteenth Amendment's Due Process Clause. If the framers had intended for the Takings Clause to include a procedural requirement, there would have been no need to prohibit deprivations of property" without due process of law." *Cf. Hurtado v. California*, 110 US 516, 534-35, 4 S Ct 111, 28 L Ed. 232 (1884) (stating that the Fifth Amendment's Indictment Clause would be superfluous if the Due Process Clause were construed to include the indictment requirement, and stating, "[W]e are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous."). The presence of those due process clauses, and their explicit application to property deprivation, indicates that the Takings Clause is con-

cerned not with process, but rather with substantive restrictions on government authority. *Cf Brown v. Legal Foundation of Wash.*, 538 US 216, 231-32, 123 S Ct 1406, 155 L Ed 2d 376 (2003) ("While it confirms the State's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."). Thus, plaintiff's argument that the government is required to follow particular procedures when imposing exactions sounds in due process, not in takings jurisprudence.

Other decisions of the Supreme Court support that conclusion. In *Williamson Planning Comm'n v. Hamilton Bank*, 473 US 172, 195 n 14, 105 S Ct 3108, 87 L Ed 2d 126 (1985), the Court noted that, unlike the Due Process Clause, the Takings Clause "has never been held to require pretaking process * * *."[5] In fact, were it otherwise, there would be no such thing as inverse condemnation as a substantive matter. *See, e.g., First Lutheran Church v. Los Angeles County*, 482 US 304, 316,107 S Ct 2378, 96 L Ed 2d 250 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *United States v. Clarke*, 445 US 253, 257, 100 S Ct 1127, 63 L Ed 2d 373 (1980) ("The phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner

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[5] In a recent opinion, the Supreme Court further distinguished the Takings Clause from the Due Process Clause, holding that the Takings Clause does not encompass the requirements of substantive due process. In *Lingle v. Chevron U.S.A., Inc.*, __US__, __ 125 S Ct 2074, 2083, 161 L Ed 2d 876 (2005), the Court disavowed the "substantially advances legitimate state interests" test for regulatory takings, first articulated in *Agins*, as "prescrib[ing] an inquiry in the nature of a due process, not a takings, test [that] has no proper place in our takings jurisprudence."

recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."). But an inverse condemnation claimant cannot prevail merely by showing that the government failed to follow condemnation procedures; he or she must show that the government actually took property. *Cf MacDonald, Sommer & Frates v. Yolo County*, 477 US 340, 348, 106 S Ct 2561, 91 L Ed 2d 285 (1986) ("[A]ppellant must establish that the regulation has in substance 'taken' his property * * *.").

The prophylactic rule that plaintiff proposes prescribes an inquiry in the nature of a due process test. It asks whether the government made *Dolan* findings before imposing an exaction. The answer to that question tells us nothing about whether an exaction effected a taking. If the government did make findings, that fact alone does not indicate whether the findings were adequate to justify the conclusion that the exaction did not effect a taking. Likewise, the bare fact that the government did *not* make findings says nothing about whether the burden imposed by an exaction is related in nature and extent to the impact of the development.

Plaintiffs proposed rule tells us nothing about whether justice requires compensation. In fact, in cases in which there is rough proportionality, the rule would saddle taxpayers with the burden of paying compensation that justice does not require. Only consideration of the nature and extent of an exaction and the impact of a proposed development, on their merits, can reveal whether the rough proportionality requirement is met. Thus, when, as in this case, a landowner first challenges an exaction in an inverse condemnation action, the government must be permitted to make its case that rough proportionality existed at the time of the exaction.

As to whether the Due Process Clause requires a rule such as the one that plaintiff proposes, that issue, whatever its merits, is not properly before us, plaintiff did not challenge the exaction in this case on due process grounds. *Cf. Lingle v.*

Chevron USA., Inc., __US __, __, 125 S Ct 2074, 2087, 161 L Ed 2d 876 (2005) (Kennedy, J., concurring) (noting that the Court did not consider whether a challenged regulation's alleged failure to substantially advance a legitimate state interest violated the Due Process Clause, because the plaintiff had dismissed its due process claim).

In short, we conclude that neither *Dolan* nor the Takings Clause requires the prophylactic rule for which plaintiff argues. It follows that the trial court erred in concluding that the city may not attempt to demonstrate rough proportionality at trial.

Order granting partial summary judgment for plaintiff reversed and remanded.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF OREGON

[Filed Mar 21, 2006]

No. 16-00-12795;
SC S53029
CA A122564

JOHN P. HAMMER,
Plaintiff-Respondent
Petitioner on Review,

v.

CITY OF EUGENE,
Defendant-Appellant,
Respondent on Review.

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Dated this 21st day of March 2006.

/s/ Paul J. De Muniz
Chief Justice

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

No. 1600-12795

JOHN P. HAMMER, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

CITY OF EUGENE, a political subdivision of the State of Oregon,

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION.

Plaintiff John P. Hammer ("Hammer") applied to Defendant City of Eugene (the "City") for a minor partition of property. As a condition of approving Hammer's application, the City required that Hammer dedicate three portions of that property to the City. In so doing, however, the City did not make any findings that its requirement was related both in nature and extent, *i.e.*, was roughly proportional, to the impact of Hammer's minor partition as required by *Dolan v. City of Tigard*, 512 US 374 (1994), and *Schultz v. City of Grants Pass*, 131 Or App 220, 884 P2d 569 (1994). As a result, the City took Hammer's property without paying the just compensation required by the United States and Oregon Constitutions and this Court should grant Hammer's Motion for Partial Summary Judgment on the issue of liability.

II. STATEMENT OF FACTS.

On December 23, 1996, John Hammer filed a minor partition[1] application with the City of Eugene requesting that he be allowed to divide his property, located at the northwest corner of Stewart Road and Bailey Hill Road, into three pieces. (*See* Exh. A to the Affidavit of Kathryn Powell Dempsey; filed herewith.) On January 23, 1997, the City issued its "Findings and Decision of the Planning Director," tentatively approving Hammer's application (the "tentative approval").[2] (*Id.* at Exh. B.) As a condition of final approval, the City required that Hammer dedicate two pieces of property to the City: A fillet[3] at the southeast corner of the property and a 15-foot square public utility easement for a future unspecified electrical utility facility.[4] (*Id.*) The City's tentative approval did not make any findings linking the required dedications to the impacts of Hammer's minor partition on City infrastructure. (*Id.*) Moreover, the City admits that it did not make *Dolan* findings in its tentative approval of Hammer's minor partition. (Dempsey Aff. at Exhs. K, L.) Hammer learned that the City would require the fillet and

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[1] A partition divides property under single ownership into two or three parcels. City of Eugene Code § 9.0500. Although undefined in the Eugene Code, a minor partition has historically been one that divides property as defined without creating a new road or street. A minor partition is administrative only; in effect, it merely divides property on paper. (*See* Schaefer Aff. at ¶ 3, filed previously in support of Plaintiffs Cross Motion for Class Certification.)

[2] The City's tentative approval is titled "Findings and Decision of the Planning Director" and is subtitled: "Tentative Approval of Minor Partition for John Hammer (M96-78)." (Dempsey Aff. at Exh. B.)

[3] A fillet is not defined in the City of Eugene Code. Commonly used, however, it appears to be a small piece of property of irregular size. In this case, the fillet rounds out what would otherwise be a square corner. (*See* Dempsey Aff. at Exh. D.)

[4] The then unspecified facility now appears to be a switch box. (*See* Dempsey Aff. at Exh. C.)

public utility easement when the City sent him a copy of its tentative approval. (*See* ¶ 5 of the Affidavit of John P. Hammer.[5]) The City's tentative approval became final on the 13th day after the City mailed it to Hammer.[6] Eugene Code § 9.7220(3).

Hammer had hired Poage Engineering and Surveying, Inc. to assist him with the minor partition. (Hammer Aff. at ¶ 4.) Doug Schwin ("Schwin") of Poage's office contacted the City on Hammer's behalf to get the fillet radius measurement so that he could draft the final plat for Hammer's minor partition. (*See* ¶ 4 of the Affidavit of Douglas P. Schwin, filed herewith.) At that time, City employee Bob Terrill ("Terrill") told Schwin that Hammer would have to provide an additional 2.2-foot right-of-way along Bailey Hill Road as a further condition to final approval of the minor partition. (*Id.* at ¶¶ 4, 5, 6.) The City did not even attempt to make findings to support this further condition. (*Id.* at ¶ 5.) Hammer learned about the additional 2.2-foot right-of-way from Schwin who called Hammer after Schwin's conversation with Terrill. (Hammer Aff. at ¶ 6.) Hammer complied with all three of the City's dedication requirements. (*Id.* at ¶ 7; Dempsey Aff. at Exhs. D, E.)

It may be helpful to the Court to understand how the City comes to demand property in connection with a minor partition. The City's process, in relevant part, is this: The City assigns a "planner-in-charge" to the minor partition file. (Dempsey Aff. at Exh. F.) The planner-in-charge routes "referrals" to various city and extra-city entities for comments. (*Id.*) The commenting entities then either return the

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[5] A telefacsimile of Mr. Hammer's affidavit is attached as Exhibit N to the Second Affidavit of Kathryn Powell Dempsey, filed herewith.

[6] In addition to notifying Hammer, the City was required to mail a copy of its tentative decision to several other entities. *See* Eugene Code § 9.7220(1).

referral forms with comments, email comments to the planner-in-charge, or return written comments separate from the referral form. (*Id.* at Exhs. G, H, I.) The referral comments include the required dedications. (*Id.* at Exhs. G, I.) The planner-in-charge then includes the required dedications in the City's tentative approval. (*Id.* at Exh. B.)

With respect to Hammer's partition, the City assigned Gabe Flock ("Flock") to be the planner-in-charge. (*Id.* at Exh. F.) Flock sent referral forms to the City Department of Public Safety, Public Works (Engineering), Public Works (Maintenance), Public Works (Transportation) and the Eugene Water and Electric Board.[7] (*Id.*) Two referral comments were returned requiring a dedication of property as a condition of minor partition approval—those of EWEB and Public Works (Engineering). (*Id.* at Exhs. G, I.) Flock included those required dedications in the City's tentative approval of Hammer's minor partition. (*Id.* at Exh. B)

III. SUMMARY JUDGMENT STANDARD.

Hammer moves the Court for an order granting him partial summary judgment on the issue of liability pursuant to ORCP 47C which states: "[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Summary judgment is appropriate if John Hammer "show[s] that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." ORCP 47C. There is no genuine issue of material fact if "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.* In making that determination, the

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[7] At least, according to the Procedure Check Sheet, Flock sent referrals to those entities. In fact, other entities returned referral comments to Flock. (*See, e.g.*, Dempsey Aff. at Exh. J.)

Court must view the record before it in a light most favorable to the City. *Id.*

IV. ARGUMENT.

A. The City of Eugene did not make findings as required by *Dolan v. City of Tigard.*

In *Dolan v. City of Tigard*, 512 US 374 (1994), the Supreme Court held that government may not compel property dedications as conditions to development approval unless it makes findings showing that the required dedications are related both in nature and extent, *i.e.*, are roughly proportional, to the impacts of the proposed development.[8] *Id.* at 391; *Schultz v. City of Grants Pass*, 131 Or App 220, 884 P2d 569 (1994) (applying *Dolan* to minor partitions of property). The findings need not be mathematically precise; nevertheless, they must be individual and quantified. *Dolan*, 512 US at 391, 395-96. Moreover, *Dolan* was very clear: Government has an *affirmative burden* to make such findings. *Id.* at 395.

There is no bright line rule that allows the Court to determine whether a particular finding satisfies *Dolan.* Case law provides some guidance. In Schultz, for example, the court rejected a finding that the partition at issue would generate eight additional vehicle trips a day as insufficient under *Dolan. Schultz*, 131 Or App at 228. In contrast, *McClure v. City of Springfield*, 175 Or App 425 (2001), held that the city complied with *Dolan* when it connected an increase of 19 vehicle trips to a 20-foot right-of-way exaction by comparing the trips generated with the total daily trips on the two affected roads and then comparing that figure to one derived from comparing the area of the exaction with the total right-of-way area on the two roads, finding that "the percentage of land exacted (1.59 percent) was less than the percentage of

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[8] The government also must show that a substantial nexus exists between the government's interest and the conditions exacted. *Dolan v. City of Tigard*, 512 US 374, 386 (1994).

trips on the two roads that the development was expected to generate (1.86 percent)." *Id.* at 435. At the same time, the *McClure* Court refused to allow exactions where the findings were either nonexistent or related the exaction generally to transportation needs. *Id.* at 433.

Here, the City was clearly required to comply with *Dolan*'s requirements. Hammer applied for a minor partition in order to divide one piece of property into three. As a condition of its final approval, the City told Hammer that he must dedicate three portions of his property to the City: A fillet at the corner of Bailey Hill and Stewart Roads, a public utility easement for an unspecified future electric facility and a right-of-way along Bailey Hill Road. Hammer complied with the City's dedication requirements and the City finally approved his minor partition.

Although obligated to comply with *Dolan*, the City, by its own admission, did not do so here. In its supplemental response to Hammer's Request for Admissions, the City admitted that it did not perform a *Dolan* rough proportionality analysis in its tentative approval of Hammer's minor partition. (Dempsey Aff. at Exh. K.) The City also admitted that, over the period which includes Hammer's minor partition,[9] the City had *never* performed such an analysis in its tentative approvals of minor partitions. (*Id.* at Exh. L.) Further, Joe Ferguson ("Ferguson"), supervisor of the City's Survey Team, (whose job is the supervision of minor partition approvals)[10] sent an email to Flock which stated:

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[9] The City made this admission covering the period from June 24, 1994 to July 24, 1998. (Dempsey Aff. at Exh. L.)

[10] Mr. Ferguson was deposed in the case of *Danebo Properties, LLC v. City of Eugene*, District of Oregon Case No. 98-6226-HO [hereinafter *Danebo*] (challenging exactions demanded as a condition of permit approval.)

> Because no additional [right-of-way] dedication was required in the previous partition in 1995,[11] they[12] assumed that would be the case here as well. . . . However at the time of the previous partition the construction plans for Bailey Hill Rd weren't completed. They are now, and we need the fillet.

(*Id.* at Exh. M.) As is obvious from Ferguson's e-mail, the City's decision to take Hammer's property did not depend on the impacts of Hammer's minor partition on City infrastructure, it depended on which property the City needed to make planned improvements regardless of the impacts. Thus, the City *did not* meet its affirmative burden under Dolan to make individual, quantified findings showing that the dedications it required of Hammer were roughly proportional to his proposed division of property.

Interestingly, the City's own ordinances require that its planning director make his or her decision with respect to partitions of property with findings and conclusions.[13] Eugene Code § 9.8215. Clearly, the planning director did not do so here. (Dempsey Aff. at Exh. B.) In fact, although the City's minor partition file is quite complete, no *Dolan* findings appear *anywhere* in the file, including in the very documents asserting the initial dedication requirements—the referral comments from EWEB and Public Works (Engineering). (*Id.* at Exhs. G, I.) Moreover, Hammer's entire minor partition file (as provided by the City) is devoid of even the information necessary to make the kind of individual, quan-

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[11] Hammer had partitioned a property, of which the property at issue here was a part, in 1995-96. (Hammer Aff. at ¶ 8.)

[12] "They" apparently refers to Mr. Hammer.

[13] City of Eugene Code § 9.8215 states that the "planning director shall approve, approve with conditions, or deny a partition, *with findings* and conclusions." (Emphasis added.)

tified findings that *Dolan* requires and the *McClure* Court approved.[14]

In sum, the City required that Hammer dedicate property to the City as a condition of approving his minor partition application. In so doing, the City did not make any findings that the City's requirements were roughly proportional to the impacts flowing from Hammer's minor partition of property as required by *Dolan*. Thus, the City has taken Hammer's property and he is entitled to just compensation for the taking.

B. Having taken the property, the City may not now make findings.

The City may argue that it can now offer findings to the Court supporting its prior takings and thereby satisfy *Dolan*. The City is wrong. Allowing the City to take private property and justify the taking after the fact is contrary to *Dolan*'s prophylactic principal.

The Supreme Court's decision in Dolan was intended to prevent governments from imposing unconstitutional conditions on landowners in exchange for application approval. *Schultz*, 131 Or App at 225-27; *Richardson v. City and County of Honolulu*, 124 F3d 1150, 1157-58 (9th Cir 1997) ("The heightened scrutiny applied in *Dolan* was employed to *prevent* the government from using its regulatory power to force individuals to bear burdens that properly should be borne by the public.") (emphasis added). Indeed, courts generally make prophylactic rules, such as that set out in *Dolan*, in situations where the absence of a clear rule creates a danger of impermissible official action. *See, e.g.*, David A.

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[14] With respect to the third dedication requirement, the right-of-way along Bailey Hill Road, the City did not even bother to put the requirement in writing. Instead, it told Hammer's agent, Doug Schwin, that the City would require the dedication. Having failed to commit the requirement even to paper, no credible argument can be made that the City met its *Dolan* obligation with regard to the dedication.

Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190, 196 (1988) (discussing prophylactic rules in the context of the First and Fifth Amendments to the U.S. Constitution). This is especially true in areas of constitutional law where there is a risk of undetected constitutional violations. *Id.* at 192-93.

In this case, the need for a prophylactic rule is clear. First, the City engaged in impermissible official action by failing to make any findings that its demanded dedications were roughly proportional to the impacts resulting from Hammer's minor partition. The City even admitted its failure—it admitted that Hammer's tentative approval did not contain any findings. Furthermore, the City's own employee stated that the City took Hammer's property because the City's plans for Bailey Hill Road were complete and the City needed Hammer's property to effect its plans.

Second, the risk of undetected constitutional violations is great. Here, Hammer complied with the City's demands even though the City failed to make findings. More importantly, however, many unsophisticated persons apply for and are granted minor partitions of property on an "over the counter" basis, *i.e.*, with minimal or no professional assistance. Such persons are likely not aware that *Dolan* limits the City's ability to impose conditions on partition approvals and are, therefore, not likely to demand that the City make the finding required by *Dolan*. Validating the City's desire to offer post-decision findings would allow the City, with little risk, to violate the basic civil rights of these unsophisticated persons. It would also allow the City to engage in the kind of lawyering espoused by the City of Portland which reported that "the only strategic method imposed by the City of Portland as a result of *Dolan* is 'preventive' lawyering. If a developer threatens to sue the City under a *Dolan* claim, then the City Attorney becomes involved and compiles adequate findings for that case in support of the dedication requirement." *See*

Lane Council of Governments, *Interpreting Dolan v. City of Tigard: The Rough Proportionality Standard*, 6 (date unknown) (footnote omitted). *Dolan* was intended to prevent preventative lawyering. Thus, this Court should not allow post-taking findings.

By asking the Court to allow the City to make findings after it has taken a landowner's property, the City, in essence, is saying that it need only attempt to comply with *Dolan* if it gets caught.[15] Imagine a situation in which police officers could coerce confessions without giving Miranda warnings[16] until the suspect later complained, but could nonetheless use the confession at trial. Here, the City is asking the Court to allow it to do exactly that—take property without making *Dolan* findings and, when the landowner later complains, offer findings and keep the property with out paying just compensation. Allowing delayed findings permits the City to act in violation of the United States and Oregon Constitutions with impunity. This Court should not sanction that result.

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[15] In *San Diego Gas & Electric Co. v. City of San Diego*, 450 US 621 (1981), the dissent, addressing the question whether invalidation of an enactment was relief from unconstitutional regulations, noted that "[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations." *Id.* at 655 n.22. It further noted that a California City Attorney had told fellow city attorneys that:

> [i]f legal preventative maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. [A recent California case] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still in the war. Good luck.

Id.

[16] *See Miranda v. Arizona*, 384 US 436 (1966).

Moreover, even if the Court were to allow the City to make findings at this late date, such findings wouldn't reliably support a past taking. How can the City recreate its infrastructure as it existed in 1996 and then create hindsight estimations of impacts to that infrastructure resulting from Hammer's minor partition? The transfer of property here is now complete—the damage is done. At any rate, even if this Court were to hold that the City could, after the fact, justify its prior actions with *Dolan* findings, until the City has made the required findings, the City remains unconstitutionally in possession of Hammer's property—a temporary taking. Under the principles of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, __US__, 107 S Ct 2378 (1987), the City is still liable to Hammer for damages.

Dolan clearly was intended to prevent government from violating the constitutional rights of its citizens. If the Court now allows the City to offer findings now that the City has taken Hammer's property, the City will continue to require permit conditions "merely . . . [as] an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Dolan*, 512 US at 390. The City has taken Hammer's property without just compensation and is therefore liable to him on that basis. As a result, this Court should grant Hammer's Motion for Partial Summary Judgment.

V. CONCLUSION

Under *Dolan*, the City had an affirmative obligation to make findings showing that the impacts resulting from Hammer's minor partition were roughly proportional to the City's requirement that Hammer dedicate three portions of his property to the City. The City admitted that failed to meet its obligation at the time it required Hammer to dedicate property. It may not now do so without violating the prophylactic principals inherent in *Dolan*. Accordingly, the City took Hammer's property without paying the just compensation

required by the United States and Oregon Constitutions and is liable to Hammer on that basis. For that reason, Hammer respectfully requests that this Court grant Hammer's Motion for Partial Summary Judgment on the issue of liability.

Dated this 25th day of October, 2001.

Schwabe, Williamson & Wyatt, P.C.

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Supreme Court, U.S
FILED
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CLERK

No. 05-1643

In The Supreme Court of the United States

JOHN P. HAMMER, on behalf of himself and others similarly situated,

Petitioner,

v.

CITY OF EUGENE, a political subdivision of the State of Oregon,

Respondent.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), established prophylactic, *per se* rules that:

1. A government effects an uncompensated taking of property if it does not make findings of rough proportionality when it first imposes, and a landowner does not challenge, its conditions on its approval of the owner's proposed land use; and

2. A government is barred from later demonstrating rough proportionality when the landowner subsequently challenges the exactions for the first time in a lawsuit for damages for inverse condemnation.

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BRIEF IN OPPOSITION

JURISDICTION

The Court should deny summarily the petition for *certiorari* for lack of jurisdiction. Petitioner seeks review of an Oregon Court of Appeals' decision regarding an interlocutory order of a trial court in litigation of state and federal constitutional "taking" claims in which the federal issue is not yet ripe for review. The petition for *certiorari* review of a non-final order does not meet the jurisdictional requirement of 28 U.S.C. § 1257(a).

ADDITIONAL STATUTORY PROVISION INVOLVED

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . , the United States.

COUNTER-STATEMENT OF THE CASE

Petitioner misstates the holding of the Oregon Court of Appeals. Petitioner resorts to rhetoric rather than record facts and focuses on matters that are beside the point of the question presented. Respondent offers this counter-statement of the case.

I. Procedural and Factual Background.

Petitioner applied to Respondent City of Eugene in 1996 for its approval of his partition of his real property. Appendix to Petition ("App.") at 7a. Respondent's planning director tentatively approved the partition on January 23, 1997, subject to certain conditions. The conditions required petitioner to: (1) provide right-of-way at the corner of one of the new parcels so that concrete walks and access ramps would be located entirely in the public right-of-way, and (2) provide a 15' x 15' public utility easement for future placement of local public utility facilities. (Appellant's Brief, Appendix at 7-8.) Respondent later added a third condition: that petitioner provide right-of-way for a sidewalk. (Ex. M to Affidavit of Kathryn Powell Dempsey in Support of Plaintiff's Motion for Partial Summary Judgment.)

In the partition approval process that Petitioner invoked – where the partition would result in parcels of minimum development size – the application to partition property was the last step in the development process in which Respondent could enforce its code requirements by imposing conditions on its approval. Respondent had no authority to do so later when it issued a building permit. (Affidavit of Jan Childs in Support of Defendant's Motion for Summary Judgment, ¶ 10.) When it approved Petitioner's application, Respondent did not make written findings concerning the degree to which the conditions of approval were roughly proportional to the impact of the proposed action. App. at 7a.

Under the local municipal code, Petitioner had the right to appeal the planning director's decision and receive a formal hearing, findings, and decision by a hearings

official. Supplemental Appendix ("Supp. App.") at 3-4 (*Former* Eugene Code ("EC") 9.030). Had Petitioner disagreed with the conclusions of the hearings official, he then could have availed himself of the State of Oregon's statutory administrative appeals processes. *See* OR. REV. STAT. § 197.805 (2005) *et seq.* (establishing a Land Use Board of Appeals). Oregon's Land Use Board of Appeals ("LUBA") has "exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency," with some exceptions. OR. REV. STAT. § 197.825 (2005). LUBA's authority includes the prerogative to review a land use decision's constitutionality. OR. REV. STAT. § 197.835(9) (2005). A party aggrieved by a LUBA decision is entitled to judicial review by the Oregon Court of Appeals. OR. REV. STAT. § 197.850(3) (2005). Upon a petition for review, the Oregon Supreme Court may review the Court of Appeals' decision. OR. REV. STAT. § 2.520 (2005).

Petitioner, however, did not appeal the decision of Respondent's planning director. Petitioner accepted without protest the conditions of tentative approval placed on his application. (Plaintiff's Response to Defendant's Request for Admissions, No. 2.) In the absence of an appeal, the planning director's tentative approval of Petitioner's application became Respondent's final decision. Supp. App. at 3 (*Former* EC 9.030(6)).

After Respondent approved Petitioner's final partition application, Petitioner sold one of the partitioned lots to his financial benefit. He retained the other lot on which he constructed three buildings, which he leases out. (Defendant's Memorandum in Response to Plaintiff's Motion for Partial Summary Judgment, pages 3-4.) Almost four years later, after approval of his land use application became

final, Petitioner filed this lawsuit against Respondent and sought compensation for the property interests he transferred to Respondent in conjunction with the final partition. App. at 8a. Petitioner brought this inverse condemnation case against Respondent as a class action in the Lane County Circuit Court for the State of Oregon. The trial court certified a class of approximately 173 persons who had filed partition applications like Petitioner's with the City of Eugene. App. at 7a, n.1. Petitioner alleged claims for an unlawful taking of his property under both Article I, section 8 of the Oregon Constitution and the Fifth Amendment to the United States Constitution. Petitioner claimed that the absence of rough proportionality findings alone established a taking. App. at 7a. Petitioner contended that Respondent should not be permitted to present evidence at trial that the conditions of approval were in fact roughly proportional to the impacts of the proposed land use application. Respondent disagreed. Following the parties' cross-motions for partial summary judgment on that issue, the trial court entered an Order Granting Plaintiff's Motion for Partial Summary Judgment, Denying Defendant's Motion for Partial Summary Judgment, Certifying Issue for Interlocutory Appeal, and Staying Trial Court Proceedings. App. at 1a-3a. The trial court ruled that Respondent's failure to make rough proportionality findings at the time of the partitions involved in this lawsuit precluded Respondent from proving at trial that the exactions were roughly proportional to the potential impacts of the partitions.

Under Oregon law, the trial court's summary judgment order normally would not be appealable. However, Oregon provides for an interlocutory appeal of class action

rulings under specified circumstances. The statute that permits such an interlocutory appeal provides as follows:

> When a circuit court judge, in making in a class action under ORCP 32 an order not otherwise appealable, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order to the Court of Appeals if application is made to the court within 10 days after the entry of the order. Application for such an appeal shall not stay proceedings in the circuit court unless the circuit court judge or the Court of Appeals or a judge thereof shall so order.

OR. REV. STAT. § 19.225 (2005).

The trial court certified this question of law for interlocutory appeal:

> Whether a city, which is sued for damages for having made an unconstitutional exaction, may attempt to prove in the case that the exaction was 'roughly proportional' to the impact of the proposed development within the meaning of *Dolan v. City of Tigard* and its progeny, notwithstanding the city's failure to have prepared written '*Dolan* findings' at the time the exaction was made.

App. at 2a.

The Oregon Court of Appeals granted Respondent's application for interlocutory appeal of the certified question. The Court of Appeals then reversed the trial court's

order and remanded the case to the trial court for further proceedings. App. at 7a, 16a. The Oregon Supreme Court declined Petitioner's petition for review of that decision. App. at 17a.

II. The Holding of the Oregon Court of Appeals.

The Oregon Court of Appeals correctly ruled that under the circumstances of this case, the Respondent was not barred from making a showing of rough proportionality between the impacts of a proposed land use and the conditions the government attached to its approval of the requested use, when a landowner first challenges the exaction:

> When, as in this case, a landowner first challenges an exaction in an inverse condemnation action, the government must be permitted to make its case that rough proportionality existed at the time of the exaction.

App. at 15a.

The court rejected as unjust Petitioner's proposed *per se* rule that a taking is proved by a lack of contemporaneous findings alone, noting:

> [The proposed rule] tells us nothing about whether justice requires compensation [and instead] would saddle taxpayers with the burden of paying compensation that justice does not require.

App. at 15a.

The court concluded that "the trial court erred in concluding that the city may not attempt to demonstrate rough proportionality at trial." App. at 16a.

The Court of Appeals reversed the trial court's order granting Petitioner summary judgment and remanded the

case to the trial court for further proceedings. App. at 16a. As a result of the decision, Respondent on remand will be permitted to introduce evidence at trial to support its position that the property exactions were roughly proportional to the impact of Respondent's approval of the land use application.

REASONS FOR DENYING THE WRIT OF *CERTIORARI*

ARGUMENT

The Court should deny the petition for writ of *certiorari* for at least two reasons. The first reason is jurisdictional. As noted above, the petition does not concern a "final judgment" and the issue it attempts to present is not ripe for review. Second, the case simply is not certworthy. The Court of Appeals' decision below correctly exposed Petitioner's claim as an unfounded and unwarranted attempt to extend *Dolan*. The lower court's decision is a well-reasoned opinion that correctly interprets *Dolan*. Moreover, the decision neither conflicts with decisions of other courts nor presents a pressing question of federal law. The Court should dismiss the petition.

I. This Court Lacks Jurisdiction To Review the Oregon Court of Appeals' Decision.

A. The petition does not concern a final judgment.

This Court's authority to conduct *certiorari* review is grounded in 28 U.S.C. § 1257(a) and confined to:

> Final judgments or decrees rendered by the highest court of a State . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution [of] . . . the United States.

28 U.S.C. § 1257(a).

No "final judgment" exists here.

The decision of the Oregon Court of Appeals that Petitioner asks this Court to review is not a judgment. Rather, it is a pretrial interlocutory ruling that remands the case back to the trial court for trial. App. at 7a. The trial court has not heard or determined the relevant factual issues and has not made a final determination concerning liability and compensation. All of those matters await trial upon remand. The trial court has not yet applied the appellate court's decision to Petitioner's inverse condemnation claim and no judgment on that claim has been issued.

Not only is a judgment lacking, but finality also is wanting. The Court has made it clear that to be reviewable, a judgment must be final in both the procedural sense and the substantive sense:

> "[The judgment] must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75, 81 (1997), *citing Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 458 (1945) (internal quotation marks omitted). This petition does not present a final judgment because Petitioner's inverse condemnation claims are

subject to further review on remand and because the Oregon Court of Appeals' decision is only interlocutory.

The Court has identified four categories of exceptional cases in which it will depart from a strict application of the word "final" in 28 U.S.C. § 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). None applies here. The first category includes cases in which "the federal issue is conclusive or the outcome of further proceedings [is] preordained." *Id.* at 479. This case resolves only a procedural aspect of the trial, *i.e.*, whether government may be permitted to present evidence of "rough proportionality."

The second category includes cases in which the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Here, further proceedings may dispense with the need to address the federal issue. For instance, the trial court may decide in favor of Petitioner on state constitutional grounds, or it may find that there is no rough proportionality on Petitioner's federal claim.

The third category of cases includes those in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The issue presented in this case would remain reviewable in the event Respondent makes a showing of rough proportionality, and Petitioner does not prevail in the trial court or in Oregon's appellate courts. In that case, Petitioner would be able to ask the United States Supreme Court to review the issue presented here.

The fourth category is comprised of cases in which the "state court decision might seriously erode federal policy" if the Court refuses to review and decide the federal issue

immediately. *Id.* at 482-83. For example, *Cox Broadcasting* presented an issue concerning freedom of the press, and the Court took review because "the litigation could be terminated by our decision on the merits and [] a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. . . ." 420 U.S. at 486.

The instances in which the Court has accepted review of decisions that arguably lack complete finality represent unusual circumstances and compelling issues. This matter is an eminent domain case. Fifth Amendment Takings cases are emblematic of cases that do not involve other federal issues and compel *certiorari* review. *Id.* at 477 n.6, *citing North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). In an inverse condemnation case, two aspects of the federal claim must be decided for a decision to be final for purposes of 28 U.S.C. § 1257: (1) whether there was a taking; and (2) if so, what compensation must be paid to the plaintiff. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981). "A state judgment is not final unless it covers both aspects of that integral problem." *Id., citing North Dakota Board of Pharmacy*, 414 U.S. at 163.

Neither of these two questions has been decided by the Oregon Court of Appeals or the trial court. Instead, the Court of Appeals accepted an interlocutory appeal of an evidentiary question certified by the trial court so that the eventual termination of litigation would be more quickly advanced. The Court of Appeals' decision permits Respondent to introduce evidence of rough proportionality at a trial that has yet to occur, and nothing more. App. at 16a. No determination has yet been made whether Petitioner's

property was taken. No decision has yet been made concerning the value of the exactions that were taken, if indeed a taking has occurred. Because there has been no judgment, let alone a final judgment, from Oregon's highest court, this Court lacks jurisdiction. Lacking jurisdiction, this Court should deny review.

B. Even if the Oregon court's decision were final rather than interlocutory, it presents no issue of federal takings law that is ripe for review.

In his complaint in state court, Petitioner alleged inverse condemnation claims under both the Oregon and United States Constitutions. His claim under the federal Constitution, however, is not ripe for adjudication until he exhausts all available state law remedies. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (when a state "provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until [the owner] has used the procedure and been denied just compensation"). Oregon recognizes claims of inverse condemnation arising under Oregon's constitutional prohibition against taking of private property without just compensation. *See, e.g., Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 117 P.3d 990, 993-98 (Or. 2005). Petitioner's claim for inverse condemnation under the Oregon Constitution must be adjudicated before his claim for inverse condemnation under the Fifth Amendment becomes ripe. The Court should deny review here because this case presents no case or controversy for the Court to resolve.

II. Even Assuming the Court Had Jurisdiction, Review Is Not Warranted in This Case.

A. The Oregon Court of Appeals' decision is correct.

Petitioner seeks to extract a new rule from *Dolan* that would expand the concept of a taking to include situations in which a procedural failure occurs at the first stage of a land use approval. Such a concept lies beyond the scope of any published court decision. It also entails seriously detrimental practical consequences. The rule that Petitioner proposes would create a land use environment in which landowners would be rewarded for deceptive practices and public money arbitrarily would be transferred to private parties. The Oregon Court of Appeals recognized that *Dolan* does not support the Petitioner's proposed rule and that adoption of the rule would not advance the policies inherent in *Dolan*. The Court aptly concluded that, "when, as in this case, a landowner first challenges an exaction in an inverse condemnation action, the government must be permitted to make its case that rough proportionality existed at the time of the exaction." App. at 15a. The decision is well reasoned and correct, and this Court's review is not warranted.

Petitioner asserts that the "clear import" of *Dolan* is to require a public body to "demonstrate *at the time* of its demand that there is a 'roughly proportional' relationship between the property exaction and the impact of the proposed development" before it can impose an exaction. Pet. at 12 (emphasis in original). However, as the Oregon Court of Appeals correctly noted, the *Dolan* Court's many references to findings "simply reflect the procedural posture of the case." App. at 13a. The Court of Appeals had previously noted several material distinctions between

this case and *Dolan*, including whether findings had been made, the timing of the landowners' challenges, the procedures the landowners followed, and whether property had yet been conveyed. App. at 10a. The court specifically observed that *Dolan* involved a situation in which findings already had been made. *Id.* The court was unable to conclude that the *Dolan* Court "intended to create a rule with such profound consequences merely by implication and in a case in which the rule had no application." App. at 13a.

The court also rejected Petitioner's argument that either *Dolan* or the Fifth Amendment requires a prophylactic procedural rule. The court noted that the Takings Clause, one of three constitutional clauses addressing private property rights, focuses on substantive matters, while the other two (the Due Process Clauses of the Fifth and Fourteenth Amendments) address procedural issues. App. at 13a. Citing *Hurtado v. California*, 110 U.S. 516 (1884), the court concluded that interpreting the Takings Clause as imposing a procedural rule would tend to render superfluous the Due Process Clause's procedural protection. *Id.*

In addition to noting the "due process" nature of Petitioner's argument, the Oregon court observed that Petitioner's proposed rule said "nothing about whether an exaction affect[s] a taking" and "nothing about whether justice requires compensation." App. at 15a. Petitioner's proposed new rule would sweep too broadly because compensation would not be limited to takings that are *actually* unconstitutional but would be required for legitimate exactions as well.

The rule that Petitioner proposes would allow exploitation of the land use process for individual gain at public expense. A landowner could readily convey – or even propose the conveyance of – street, sidewalk, or utility easements as conditions of approval of his land use application. The landowner would then be in position to reap the benefit of the increased value of the subject property due to improved access or newly available infrastructure. The landowner could capitalize on the "taking" and, at his leisure, file an action against the government for damages based solely upon the lack of contemporaneous findings regarding the rough proportionality between the impacts and the land uses which the landowner himself had fostered. Under Petitioner's proposed rule, the governmental entity would be powerless to show that the condition was indeed justified. The government would be unable, in the proceeding in which the landowner first challenged the conditions of approval, to defend against the landowner's takings claim. The government would be required to open the public coffers to the very landowner who lulled it into not making rough proportionality findings in the first instance. As the Oregon Court of Appeals noted, Petitioner's rule "would saddle taxpayers with the burden of paying compensation that justice does not require." App. at 15a. There is no hint in *Dolan* that the Court intended such a result.

Petitioner concedes that the *Dolan* court "did not have occasion to decide the precise issue presented [by Petitioner] in this case." Pet. at 11. At the same time, Petitioner urges this Court to "make it clear to government officials that *Dolan* does, in fact, establish a prophylactic rule which cannot be ignored until after property is taken without just compensation." Pet. at 17. Petitioner's two

positions are incompatible. Despite his statements to the contrary, Petitioner is not asking this Court simply to enforce *Dolan*. He seeks this Court's creation of a new constitutional rule. The circumstances of this case do not demonstrate a need for an extension of existing law.

Petitioner contends that the Oregon Court of Appeals' decision allows governments to "impose highly onerous property exactions . . . while completely ignoring *Dolan*'s requirements[,]" and that it "authorizes the government to attempt to cure that [situation] . . . by performing a belated and after-the-fact 'rough proportionality' analysis" if the property owner sues. Pet. at 3. In fact, the court's decision does not relieve a government of the duty to act in a constitutional manner or to comply with *Dolan*. Upon remand, Respondent still has the burden to prove rough proportionality, and if it cannot meet its burden, then Respondent will have to pay just compensation.

Petitioner also contends that the court's decision allows governments "to ignore, with impunity, the constitutional requirements of 'rough proportionality' until long after the physical taking of an applicant's property is complete." Pet. at 7. Nothing the Oregon Court of Appeals said reasonably can be construed as permission to ignore *Dolan*'s substantive requirements. The Oregon Court of Appeals specifically noted that this case involves a petitioner who did not appeal the conditions of approval but instead chose to challenge them later through an inverse condemnation action. App. at 15a. The delay in showing rough proportionality in this case is attributable to Petitioner's own actions, not to Respondent.

B. The Oregon Court of Appeals' decision does not conflict with any decision of any state court of last resort or any decision of any U.S. Court of Appeals.

The Court's review is not warranted here because the petition presents no split of judicial authority that requires this Court's immediate attention. Only one other appellate court has directly considered the issue addressed by the Oregon Court of Appeals, and that court rejected the interpretation of *Dolan* espoused by Petitioner. *See Town of Flower Mound v. Stafford Estates L.P.*, 71 S.W.3d 18 (Tex. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004). There is no conflict between the two state appellate court opinions.

Petitioner asserts that the dissent of three Justices of this Court to the denial of a petition for *certiorari* shows that the issue he poses is of concern to the Court. Pet. at 16, citing *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting, joined by Kennedy and Thomas, JJ). *Lambert* concerned a federal court of appeals decision that rejected a takings claim based on a denial of a permit application. 120 S. Ct. at 1550. The lower court had concluded that the denial was not based on the inadequacy of the petitioners' offer to pay for replacement costs, and the court had concluded that there was no taking because the government had not demanded anything. *Id.* The three justices who dissented from the denial of the *certiorari* petition did not express concern about any issue of a lack of contemporaneous rough proportionality findings but rather focused on the substantive requirements of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan*. Indeed, Justice Scalia noted his preference for "summary reversal, and

remand for conduct of the *Nollan-Dolan* analysis," had there not been a plausible basis for the lower court's decision. 120 S. Ct. at 1552. Petitioner's proposed rule triggers no need for a remand for further analysis. The dissenters expressly were concerned about *Dolan*'s substantive requirements, not about any particular procedural question. Moreover, the *Lambert* case did not concern whether a governmental entity could show rough proportionality at trial, and thus it is not on point. The dissent in *Lambert* does not demonstrate an existing controversy as to the question presented here.

C. The Oregon Court of Appeals' decision will not have the significant adverse impact Petitioner predicts.

Petitioner predicts widespread and dire consequences for property owners throughout the country if the Oregon Court of Appeals' decision is allowed to stand. Pet. at 17-18. Extrapolating from the City of Eugene's population figures and the alleged facts in this case, Petitioner postulates that "many thousands" of people may be subject to unconstitutional takings if the Court does not grant his petition. Pet. at 18. Other than noting the existence of the Texas court's decision is the *Flower Mound* case, Petitioner provides no "evidence" that a problem exists or is likely to exist.

An additional problem plagues Petitioner's prediction: His argument assumes a direct correlation between the mere making of rough proportionality findings and the constitutionality of an exaction. Findings may demonstrate that an exaction is justified, or the findings may be insufficient. The bare fact that a governmental entity makes findings does not satisfy its burden to show that an

exaction is roughly proportional to the impact of the proposed land use. A requirement that a governmental entity make contemporaneous findings would not guarantee the constitutionality of its actions. In the same way, the absence of findings does not *disprove* rough proportionality. The Oregon Court of Appeals' decision does not make *Dolan* meaningless because it does not relieve governments of their duty to show rough proportionality. Rather, it simply permits governments to demonstrate rough proportionality in the first proceeding in which the landowner raises a takings claim. This case does not involve a pressing issue of federal law.

CONCLUSION

Petitioner seeks review of an interlocutory order in a matter in which no federal issue is ripe for review. Additionally, the Oregon Court of Appeals' decision below correctly concluded that Petitioner is espousing a misapplication of *Dolan*. The petition for *certiorari* presents no pressing federal constitutional issue. The Court should deny the petition.

Respectfully submitted,

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Procedure for Dividing Property

9.030 *Minor and Major Partition Tentative Plan Procedure.*

(1) *Tentative Minor and Major Partition Plan – Application.* An application and related information prescribed by the city as required for minor and major partition tentative plan approval shall be submitted for all contiguous property under the same ownership by the person proposing the tentative plan, together with a fee set by the city manager as provided by section 2.020 of this code.

(2) *Tentative Minor and Major Partition Plan – Review by Other Departments and Agencies.* Within five days after a complete and accurate tentative partition plan application is received, copies shall be distributed to appropriate agencies and departments for review, comments and recommendations. If a written response or extension request is not received within 15 days, the proposal shall be assumed to be acceptable as submitted.

(3) *Tentative Major Partition Plan – Notice to Other Properties.* Within ten days of receipt of a complete and accurate application but no less than ten days before the planning director makes a decision, notice of the major partition request shall be mailed to owners and occupants of property located within 100 feet of the perimeter of the subject property.

(4) *Tentative Minor and Major Partition Plan – Planning Director Decision.* Unless the applicant agrees to a longer time period, the planning director shall approve, conditionally approve, or deny a tentative partition plan application with findings and conclusions thereon, within 30 days of receipt of a complete and accurate application.

The planning director's decision shall be based on the following criteria:

(a) In the case of a major or minor partition, that the proposed partition will comply with all applicable platting standards of this chapter.

(b) In the case of a major partition, that:

1. Approval does not impede or adversely affect the safe and healthful development of any adjoining land or access thereto;

2. The proposed partition will be consistent with applicable adopted plans.

3. The proposed partition will not cause unreasonable street congestion, risk of fire, flood, geological hazards, pollution, or similar dangers, hamper adequate provision for transportation, water supply, sewage disposal, drainage, education, recreation, and other public services and facilities or result in inadequate light and air or overcrowding of land.

4. Streets and roads are laid out so as to provide for the extension of streets to adjoining undeveloped properties and provide for eventual connection with the existing public street system as specifically required by the street connectivity standards of section 9.045 of this code. The planning director shall permit private streets or roads only upon finding that the developer has demonstrated that a public street is not necessary for compliance with this code and the street connectivity standards of section 9.045.

5. The proposed major partition is laid out to provide safe, convenient, and direct bicycle and pedestrian access to and from nearby and

adjacent residential areas, transit stops, neighborhood activity centers, commercial areas, and industrial areas, and to provide safe, convenient and direct transit circulation. At a minimum, "nearby" is interpreted to mean uses within 1/4 mile which can reasonably be expected to be used by pedestrians, and uses within one to two miles which can be reasonably expected to be used by bicyclists.

(5) *Tentative Minor and Major Partition Plan – Notice of Decision.* Within five days after the planning director renders a decision, the city shall mail notice of the decision to the applicant, persons who have requested notification, and persons who were entitled to receive notice of the applicant's request under subsection (3) of this section. The notice shall summarize the decision and inform of the opportunity to appeal the decision in the manner provided in subsection (7) of this section.

(6) *Tentative Minor and Major Partition Plan – Effective Date and Expiration.* Unless appealed, the planning director's decision is effective on the eleventh day after notice of the decision is mailed under subsection (5) of this section. The applicant may then proceed with final surveying and preparation for approval consideration of the minor or major partition plat. Tentative plan approval shall be effective for one year, within which time the application and minor or major partition plat must be submitted. Otherwise, the entire procedure must be repeated for consideration in light of changed conditions that may exist.

(7) *Tentative Minor and Major Partition Plan – Appeal to the Hearings Official.*

(a) Within ten days of the date that notice of the planning director's decision is mailed, it may be

appealed to the hearings official by the applicant, a party, an adversely affected person, or a person entitled to notice under subsection (3) of this section.

(b) An appeal shall be on a city form and state specifically how the planning director failed to properly evaluate the proposal or make a decision consistent with applicable criteria.

(c) Unless the applicant and appellant agree to a longer period, the hearings official shall hold a public evidentiary hearing on an appeal within 45 days of submittal. At least 20 days before the hearing, notice thereof shall be mailed to the applicant, appellant, and persons who requested notice of the planning director's decision.

(d) Within 15 days of the hearing, unless the applicant and appellant agree to a longer period, the hearings official shall make a decision and within five days thereafter mail a notice of the decision to the applicant, appellant, and persons who have requested notification. The hearings official's decision is final.

(Section 9.030 added by Ordinance No. 16971, enacted January 28, 1974; amended by Ordinance No. 18772, enacted April 13, 1981; Ordinance No. 19197, enacted November 16, 1983, effective January 1, 1984; Ordinance No. 19328, enacted June 10, 1985; Ordinance No. 19400, enacted August 13, 1986, effective January 1, 1987; Ordinance No. 19625, enacted July 10, 1989; Ordinance No. 19770, enacted April 22, 1991, effective May 22, 1991; Ordinance No. 19946, enacted December 6, 1993, effective January 5, 1994; and Ordinance No. 20056, enacted August 5, 1996, effective September 4, 1996.)

(4)

No. 05-1643

IN THE

Supreme Court of the United States

JOHN P. HAMMER,
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF EUGENE,
a political subdivision of the State of Oregon,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Dolan v. City of Tigard*, 512 U.S. 374 (1987), create a prophylactic rule that requires governmental entities to make findings of "rough proportionality" at the time that they impose property exactions as a condition to development?

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Petitioner submits this Reply Brief to address new points raised in Respondent's Brief in Opposition. Sup. Ct. R. 15.6 (authorizing reply brief for that purpose). Respondent argues that this Court should deny the Petition for a Writ of Certiorari on the grounds that (1) this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to decide the issue presented, and (2) the petition does not present an issue that is ripe for review. Neither argument has merit.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(A)

Twenty-eight U.S.C. § 1257(a) limits this Court's authority to review decisions of state courts to only those cases in which the state's highest court has rendered "[f]inal judgments or decrees." In this case, no final judgment has issued because the state court judgment at issue remanded the case to the trial court for trial on the merits of petitioner's inverse condemnation claim.

The absence of a final judgment, however, does not mean that this Court is deprived of jurisdiction to consider the federal issue presented in this Petition for a Writ of Certiorari. That is so because the requirement of finality in 28 U.S.C. § 1257(a) is not absolute. Instead, this Court has interpreted 28 U.S.C. § 1257(a) to permit review of non-final judgments of a state's highest court in limited circumstances supporting a finding of finality on the federal question at issue. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975) (discussing same). In doing so, this Court has recognized "the mischief of economic waste and of delayed justice" which results from delayed review in cases where the anticipated additional state court proceedings involve no other federal questions which also might later require review by this Court. *Id.* at 478 (internal quotation marks and citations omitted).

Among the categories of cases in which this Court has allowed review of non-final state court decisions are those cases in which an important federal question might be mooted by the later state court proceedings. Specifically, this Court has described the posture of such cases as those in which:

> the party seeking review [with this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court,

> and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. Notwithstanding the lack of a final state court judgment, this Court has recognized that those circumstances warrant immediate review because a delay "might seriously erode federal policy[.]" *Id.* at 483.

This Petition for a Writ of Certiorari presents an important federal issue that might be mooted by the anticipated additional state court proceedings. At issue in this petition is whether the Takings Clause of the Fifth Amendment—as interpreted by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1987)—requires the government to make findings establishing the essential nexus and rough proportionality between an exaction and the alleged impact of a proposed development of private property *at the time* that the government imposes an exaction. That question will be mooted if Petitioner were to prevail on the merits of his underlying claim. In addition, a reversal of the state court ruling on that question will conclusively establish that the government's action in this case constituted a taking without just compensation in violation of the Fifth Amendment. This is true because it is uncontradicted that the City did not make *any* findings of rough proportionality in *any* of the approximately 173 minor partitions which were granted during the class period. Thus, this case satisfies both prongs of the test that this Court identified in *Cox* for this exception to apply.

If Petitioner were to prevail on his takings claim in the anticipated state court trial, then the federal question presented in this petition would be moot because Petitioner no longer would have grounds to challenge the timing of the government's essential nexus and rough proportionality deter-

minations. As described at length in Petitioner's Petition for a Writ of Certiorari and in the brief of *amicus curiae* Pacific Legal Foundation, the question whether governments may delay making such findings until an exaction is challenged is an important federal question that this Court has not yet addressed and that will have a substantial impact on the way that municipalities and other governmental entities process land use applications. Moreover, a determination that governments must make those findings at the time of the exaction will conclusively establish that an unlawful taking occurred in this case because it is undisputed that no such findings were ever made. No federal constitutional issues would remain because it is undisputed in this case that, if the exactions at issue constituted "takings," the City did not pay just compensation.

For those reasons, notwithstanding the lack of a final state court judgment, this Court has jurisdiction under 28 U.S.C. § 1257(a) to consider the federal issue squarely presented by this Petition for a Writ of Certiorari.

II. THE FEDERAL ISSUE IN THIS PETITION IS RIPE FOR THIS COURT'S REVIEW

In addition to challenging the basis of this Court's jurisdiction, Respondent also argues that the federal takings issue in this petition is not yet ripe for review. Specifically, notwithstanding the fact that the Oregon state courts did not perceive any ripeness obstacle, Respondents contend that Petitioner has failed to exhaust all available state law remedies. That contention is erroneous.

Respondent's ripeness argument is premised on the existence of an Oregon state constitutional prohibition against taking of private property without just compensation. According to Respondent, Petitioner has not exhausted all his state remedies because the state courts made no ruling on whether the governmental action violated the Oregon state

constitutional takings clause. Petitioner, however, presented both state and federal constitutional claims to the Oregon state courts. The fact that the Oregon state courts resolved the question by relying on federal constitutional law, rather than state constitutional law, does not mean that all state remedies were not exhausted.

CONCLUSION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to consider the federal issue in this Petition for a Writ of Certiorari because this petition presents an important federal question that might be mooted by the anticipated additional state court proceedings. The federal issue in this petition is also ripe for review because Petitioner has sufficiently exhausted all available state court remedies.

For the above reasons, and the reasons stated in Petitioner's petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Court of Appeals of Oregon

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QUESTION PRESENTED

1. Does the Takings Clause of the Fifth Amendment to the United States Constitution require that government make findings establishing an essential nexus and rough proportionality between an exaction and the alleged impact of a proposed use or development of private property at the time of the imposition of said exaction?

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Been, Vicki, *Impact Fees and Housing Affordability, in* 8 *Cityscape: A Journal of Policy Development and Research* 139 (William R. Zachmann ed., 2005) . . . 8

Callies, David L. & Breemer, J. David, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39 (2000) 4

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U.S. Census Bureau, U.S. Dep't of Commerce, *1957 Census of Governments, Vol. 4, No. 3, Historical Summary of Governmental Finances in the United States* 22 Table 6 (1958) 8

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner John P. Hammer.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. For thirty years, PLF has been litigating in support of the right of individuals to make reasonable use of their private property. PLF attorneys have been before the United States Supreme Court on four occasions representing individuals whose rights to use their property was unlawfully denied by government agencies. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF has participated as amicus curiae in nearly every other major takings case before the United States Supreme Court in the past quarter century. *See, e.g., Kelo v. City of New London, Connecticut*, 125 S. Ct. 2655 (2005); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

PLF filed a brief below on behalf of Petitioner in *Hammer v. City of Eugene*, 121 P.3d 693 (Or. Ct. App. 2005). PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case.

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

Petitioner John P. Hammer applied to the City of Eugene (City) for a minor partition of his property. *Hammer*, 121 P.3d at 694. The application was approved, with a condition that Hammer dedicate portions of his property to the City of Eugene. *Id.* Hammer sued the City for damages and injunctive relief in a class action lawsuit alleging takings of private property in violation of both the Takings Clause of the Fifth Amendment to the United States Constitution and the Oregon Constitution. *Id.*

The City did not make any findings to indicate the constitutionally required proportionality between the dedication of land and the impact of the partition on public facilities; the City instead sought to do so only after it was sued. *Id.* at 695-96. The court of appeals concluded that nothing in this Court's precedents, or in the Takings Clause itself, required the City to make findings supporting the land-use exaction *before* it was imposed on Hammer. *Id.* at 698. It held that the City's *post hoc* explanations were constitutionally adequate. *Id.* The Oregon Supreme Court denied review of the court of appeals' decision. *Hammer v. City of Eugene*, 132 P.3d 28 (Or. 2006).

SUMMARY OF ARGUMENT

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), explain *what* government must do to ensure that an exaction is constitutional under the Takings Clause. But the decisions do not say *when* government must do it. A resolution of this question is important for at least three reasons.

First, the issue implicates a fundamental constitutional right: the right under the Takings Clause to use and develop private property free from unconstitutional exactions. While the Court has accorded prophylactic protection to other fundamental constitutional rights—such as those embodied in

the First and Fourth Amendments—the Court has yet to make clear that property rights enjoy the same protection.

Second, the last several decades have seen a substantial growth in the use of exactions by municipalities across the country to finance public improvements. A decision of this Court in this case would impact thousands of municipalities and many more property owners.

Third, the exactions process is currently plagued by a lack of clarity and fairness. Municipalities, property owners, and the courts do not know how the *Nollan* and *Dolan* tests should be implemented—specifically, when government must make findings in support of an exaction. The absence of standards has created a perverse incentive for government to postpone the required *Nollan/Dolan* analysis until after it is sued; it has spawned costly litigation between governments and property owners; and it has left those property owners who cannot afford legal counsel at the mercy of unjustified—and often illegal—exactions.

ARGUMENT

I

THIS CASE IMPLICATES THE FUNDAMENTAL RIGHT TO PRIVATE PROPERTY AND WHETHER IT SHOULD BE ACCORDED THE SAME PROTECTION AS OTHER FUNDAMENTAL RIGHTS

A. This Case Involves the Right to Use and Enjoy Property, Which Is a Fundamental Right

This case involves the question of whether the right to use and enjoy property—long-considered a fundamental individual right—should receive the same protection as the other fundamental rights. Without the Court's resolution of this question, property rights risk being "relegated to the status of a

poor relation" to other fundamental rights protected in the Bill of Rights, which is a result that this Court expressly rejected in *Dolan*. *Dolan*, 512 U.S. at 392.

"Property rights, and particularly rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States." David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 39 (2000). As Judge Janice Rogers Brown has observed, "[t]he idea that property ownership is the essential prerequisite of liberty has long been a fundamental tenet of Anglo American constitutional thought." *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 120 (Cal. 2002) (Brown, J., dissenting) (internal citation and quotation marks omitted)). "The protection of property rights secures and augments personal freedom." Bernard H. Siegan, *Property and Freedom* 9 (1997).

Given the historical importance in this country of property rights, it is not surprising that the Bill of Rights "is very much a property-oriented document." Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 118-19 (2001) (observing that numerous clauses in the Bill of Rights, including the Takings Clause, "shield[] from federal intrusion those property interests of most concern in [the constitutional] period: one's home, land, office, firearms, and financial resources"). The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795), the Court declared that the right of property is one of the "natural, inherent, and unalienable rights of man." In *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829), the Court declared that the right of "private property should be held sacred." In the more recent case of *United States v. James*

Daniel Good Real Prop., 510 U.S. 43, 61 (1993), the Court recalled "an essential principle: Individual freedom finds tangible expression in property rights." In *Dolan*, the Court explained:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Dolan, 512 U.S. at 392.

In sum, there is no question that the right to use and develop private property is a fundamental one. This Nation's constitutional and political traditions, its Bill of Rights, and its jurisprudence leave no room for doubt that property rights are on par with other fundamental rights. As this case shows, however, the question remains whether property rights will be accorded the same level of protection as other fundamental rights.

B. This Case Gives the Court the Opportunity to Make Clear That Property Rights Are Not a "Poor Relation" to Other Fundamental Rights

The Takings Clause, like the other provisions of the Bill of Rights, sets out a general principle unaccompanied by instructions as to how to implement that principle. One legal scholar noted that "constitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate." David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988). Thus, the courts have adopted rules designed to implement the protection of various fundamental rights, thereby reducing the risk that such rights will be violated in the first place. *Id.* at 208.

In the area of First Amendment law, Professor Strauss observes that this Court's "requirement of clear standards

reduces the danger that speech will be suppressed unlawfully." *Id.* at 197 (analyzing *Lovell v. City of Griffin, Georgia*, 303 U.S. 444 (1938)). In *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 150-51 (1969), this Court reaffirmed this principle when it held that a "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."

Also, the Court has articulated a prophylactic rule for the Fourth Amendment's guarantee against unreasonable searches and seizures. U.S. Const. amend. IV. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court affirmed that the government ordinarily may not conduct searches and seizures without first obtaining a warrant of probable cause; *post hoc* justifications for a search and seizure are nearly always constitutionally inadequate, and evidence obtained without a warrant is typically inadmissible. *Id.* at 655. Similarly, this Court created the prophylactic *Miranda* rule to protect the individual's Fifth Amendment right against self-incrimination. Statements that are procured before *Miranda* warnings are given are generally inadmissible. *Miranda v. Arizona*, 384 U.S. 436 (1966).

While property rights are just as fundamental as these other rights enshrined in the Bill of Rights, property rights have not been accorded the same level of protection. Together, *Nollan* and *Dolan* set out substantive requirements of the Takings Clause applicable to exactions cases: Government must demonstrate an essential nexus and rough proportionality. However, beyond these substantive requirements, the decisions of this Court provide little guidance as to how to implement *Nollan* and *Dolan*. Must government make the required findings at the time an exaction is imposed? Or can it cobble together a *post hoc* rationalization for an exaction, when it becomes necessary to defend a lawsuit?

In other words, this Court has not yet accorded property rights the same *prophylactic* protection as other fundamental rights. As this case demonstrates, government currently has the choice either to justify an exaction before it is imposed or to create *post hoc* rationalizations for the exaction after it is sued. There is no reason to relegate property rights to the status of a "poor relation," and this case presents this Court with the opportunity to make clear that property rights *are* entitled to the same sort of prophylactic protection as any other fundamental right in the Bill of Rights.

II

THE ISSUE PRESENTED IN THIS CASE HAS A PROFOUND IMPACT ACROSS THE COUNTRY

A resolution of the question of when government must make *Nollan/Dolan* findings can have a substantial impact on the way thousands of municipalities and many more property owners pursue and process land use applications on a daily basis across this country. The use of exactions is "more than a local and isolated phenomenon." *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting from the denial of certiorari). "Over the past three decades, increasing numbers of local governments . . . have turned to new methods of financing public works projects, especially land use exactions and impact fees." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005) (book review); *see also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

A 2000 General Accounting Office survey of United States cities with a population of 25,000 or more concluded that

approximately 60% of those cities use monetary exactions to fund the infrastructure necessary for new development. Vicki Been, *Impact Fees and Housing Affordability*, *in* 8 *Cityscape: A Journal of Policy Development and Research* 139 (William R. Zachmann ed., 2005), *available at* http://www.huduser.org/periodicals/cityscpe/vol8num1/cityscapev8num1.pdf (last visited Aug. 22, 2006). The use of exactions has noticeably increased in the last several decades. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1524 (2006). In 1957, only 20% of total locally derived funds came from charges, assessments, and other fees. *Id.* at 1585 n.49 (citing U.S. Census Bureau, U.S. Dep't of Commerce, *1957 Census of Governments, Vol. 4, No. 3, Historical Summary of Governmental Finances in the United States* 22 Table 6 (1958)). By 1997, these exactions made up 38% of locally derived revenues—i.e., an increase of 18%. U.S. Census Bureau, U.S. Dep't of Commerce, *2002 Census of Governments, Vol. 4, No. 5, Government Finances* 2 Table 2 (2005), *available at* http://www.census.gov/prod/2005pubs/gc024x5.pdf (last visited Aug. 22, 2006). Some scholars have argued that, in reaction to *Nollan* and *Dolan*, "local governments have . . . impos[ed] a greater number of legislative exactions." Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & Pol. 451, 452 (2005).

There are two principal reasons why municipalities increasingly have turned to exactions as a method of financing public projects. First, general taxes—historically, the primary source for public financing—have fallen out of favor with the voting public. *See, e.g.*, Cal. Const. art. XIIIA, §§ 1-4 (provision that California voters added to their constitution and that severely limits the ability of local governments to impose property taxes). As one commentator has put it,

> Because tax increases are so politically unpopular, many states turned to development exactions. For

> example, to deal with the cost of growth created by new development, about half of the states enacted an impact-fee statute, a type of development exaction, to give local governments authority to exact fees from developers for any type of development, from subdivisions to strip malls.

Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 T.M. Cooley L. Rev. 1, 2 (2005).

Second, municipalities have used exactions to finance public projects simply because they can, with little to no resistence. The use of exactions against individual property owners as a way of financing public projects enjoyed by everyone in the community is very popular. Rosenberg, *supra*, at 262 ("Residents now urge their elected officials to adopt impact fees when the locality has not yet done so."). "Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find impact fees an irresistible policy option." *Id.* Moreover, exactions are often imposed on developers, who accept them without a fight, because they can easily pass on the costs to individual property owners. *Id.* at 204 n.93.

Given the growing and widespread use of exactions, it is vital that this Court clarify how the requirements of *Nollan* and *Dolan* are to be implemented. A decision of this Court on this issue would resolve an unsettled question of law that impacts governments and property owners across the country on a daily basis.

III

THIS CASE CAN HELP TO CLARIFY AND TO RESTORE FAIRNESS TO THE EXACTIONS PROCESS

The process by which government imposes exactions on property rights lacks clarity and fairness. Without guidance as to how to implement *Nollan* and *Dolan*, it is no wonder that disputes regularly arise about government's failure to justify exactions. *See, e.g., Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004) (example where government made no *Nollan/Dolan* findings prior to imposing exaction). It is also no wonder when government takes advantage of the absence of standards to postpone the required *Nollan/Dolan* analysis until it is taken to court, only to find out later that the exaction at issue bears little relation to the proposed use of the property. William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865, 881 (1991) (reporting evidence that "many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction").

A case that amicus recently litigated in the State of California illustrates why this Court must provide guidance to municipalities, property owners, and the lower courts about how *Nollan* and *Dolan* are to be implemented. In *Ahmad v. City of Elk Grove*, No. 05CS01760 (Sacramento Super. Ct. filed Dec. 22, 2005), the plaintiffs purchased a two-acre corner lot in the rural section of the City of Elk Grove, California, where they planned to build a home for themselves and their child. The City of Elk Grove required that, in exchange for a building permit, they pay a $240,360 fee for public improvements and dedicate a six-foot landscape easement along one side of their property. As an alternative to paying the fees, the City required the plaintiffs to sign a "deferred improvement agreement,"

whereby the plaintiffs would agree to pay an unspecified amount of money to the City, for unspecified public projects, in some unspecified time in the future. The City supplied no explanation, much less *Nollan/Dolan* findings, to justify the exactions. The unexpected—and unexplained—exactions put the plaintiffs in a financial bind, so the plaintiffs commenced legal action.

The plaintiffs were required to go through a lengthy administrative appeal within the City before filing suit in court. At each of the various steps of the administrative appeal process, the plaintiffs requested *Nollan/Dolan* findings justifying the exactions. The City refused to provide findings. However, after the first of two administrative hearings, the City eliminated the easement requirement and reduced the fees by almost $100,000. The City stood firm on the remaining fees after the final administrative hearing. At no time during the entire administrative appeal process did the City ever address the plaintiffs' legal arguments regarding the lack of a nexus and rough proportionality under *Nollan* and *Dolan* between the fees and the impact of their single-family home on public facilities.

The plaintiffs filed suit in state court, requesting a declaration that the remaining fees were unconstitutional and for an injunction requiring the imposition of fees that are proportional to the impact of a single-family home. Within months, and shortly before the date on which its response was due, the City adopted a temporary emergency ordinance. The ordinance drastically reduced the fees for a very small area of the City—including the area in which the plaintiffs' property happened to be located. Under the ordinance, the plaintiffs were required to pay only $9,500 for their right to build a home.

As this and other cases show, *e.g.*, *Town of Flower Mound*, 135 S.W.3d 620, municipalities can easily impose exactions without justifying them as required by *Nollan* and *Dolan*. A municipality currently has the incentive under federal

law to put off making *any* findings in support of an exaction until the property owner sues. By the time the municipality does undertake the required *Nollan/Dolan* analysis in the midst of litigation, it could conclude that its exaction was unjustified after all—a conclusion costing the parties and the courts both time and money. Until government knows *how* to implement *Nollan/Dolan*, the land-use exactions process will continue to be plagued by a lack of clarity and fairness. This case presents this Court with the opportunity to articulate clear standards as to when *Nollan/Dolan* findings must be made.

CONCLUSION

Nollan and *Dolan* went a long way toward protecting property rights by requiring government to make findings that support exactions imposed on landowners. But these cases left open the fundamental question of how to apply their standards: When must government make their *Nollan/Dolan* findings? With the ever-increasing and widespread use of exactions in this country, and the current lack of direction as to how to implement *Nollan/Dolan*'s findings requirement, it is imperative that this question be resolved now. The petition for writ of certiorari should be granted.

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Respectfully submitted,

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